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RELATING TO

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AND

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TO WHICH ARE ADDED

*CHAPTERS ON THE LAWS OF THE BRITISH COLONIES,  
EUROPEAN AND ASIATIC NATIONS, AND THE  
STATES AND REPUBLICS OF AMERICA.*

BY

FRANCIS TAYLOR PIGGOTT, M.A., LL.M.

<sup>Esq.</sup>  
OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW.

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## PREFACE TO THE SECOND EDITION.

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A FIRST edition can scarcely pretend to be more than a sketch of any subject: in the second, the author may hope to arrive at more perfect and finished work. In recasting and rewriting the volume published in 1879, I have therefore attempted a deeper analysis of the subject which a more prolonged study of the cases rendered possible. In doing this I received many valuable suggestions from my friend Mr H. Duff of the Inner Temple.

The volume published in 1881 reappears as chapters xii to xvi of the present work: these chapters preserve their original form, which kept convenience of reference principally in view. A considerable amount of information has been added to them, and many serious omissions have been supplied. To a member of the *Reichsjustizamt* at Berlin, one of the most erudite of German judges, Mr *Landrichter* Vierhaus, who has been my unwearied correspondent during the last eighteen months, I am indebted for much of this additional information, and for the entire chapter on German law. Without his valuable aid even an approach to completeness would have been impossible. I am also under a debt of great obligation to Mr Ernest Schuster, of the Middle Temple, who has laboured unceasingly in my behalf in the collection and translation of foreign laws.

F. T. P.

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## PREFACE TO THE FIRST EDITION OF PART I.

---

NO one who has had occasion to study the leading cases on the subject of the effect of Foreign Judgments in the English Courts, can fail to have been impressed with the diversity of principles contained in them. This will I hope sufficiently account for what may appear the somewhat arbitrary manner in which I have made use of the authorities.

The subject itself, one of judge-made law, will I trust be considered a valid excuse for giving so many verbatim extracts from judgments.

I am under a great debt of gratitude to Mr Frederick Whinney and to Mr Shelford Bidwell, of Lincoln's Inn, for many valuable suggestions and for much patient revision of the whole work.

F. T. P.

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*June, 1879.*

## PREFACE TO THE FIRST EDITION OF PART II.

---

THE first part of this work, published two years ago, dealt with the effect of a foreign judgment in the English courts : in this second part I have collected as far as it has been possible to obtain it the foreign and colonial law bearing upon foreign judgments and upon service out of the jurisdiction. Its publication seemed warranted by the growing importance of the subject and may perhaps prove a first step towards obtaining a complete embodiment of the law, and to the knowledge and perhaps gradual assimilation of the practice of different nations.

I trust that the errors will be corrected and the omissions supplied by the courtesy of readers both at home and abroad.

F. T. P.

TEMPLE.

*April, 7, 1881.*



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## ABBREVIATIONS.

A. L. E.—Annuaire de Legislation Etranger.  
J. D. I. P. or J.—Journal de Droit International Privé.  
R. D. I.—Revue de Droit International.

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## INTRODUCTION.

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THE subject of Foreign Judgments forms the most practical if not the most important chapter in Private International Law ; for it involves the consequence and practical application of the principles which that law expounds. It is the last chapter, in which the results arrived at in all the earlier chapters reappear. As a practical matter it is evident that principles of International law must be worth little unless universally recognised and acted on ; if they are universally recognised, then when a decision is given in one country in which any of those principles are acted on there can be little hesitation in predicting the universal recognition of the decision itself. The importance and magnitude of the subject can only be gauged by the importance and variety of the questions on which it touches : these questions extend over the whole range of law. The commercial relations between merchants of different nations are not affected by it in a less degree than the social relations involved in the manifold questions of status : In time of war it assumes even a higher importance, and deals with the conflicting interests of belligerent and neutral States.

Nevertheless, it has received at the hands of the most distinguished International Jurists only that somewhat hasty treatment which a closing chapter too often receives ; and at the hands of eminent Judges that too cursory treatment which condenses into a judgment on a single point, a review of the whole subject of which the question itself under discussion forms but a small part. Fully conscious of this importance I have endeavoured to develop the chapter into a volume.

To that learned and brilliant Judge who has devoted much time and thought to the solution of some of the difficult problems involved, I have ventured, by his courteous permission, to dedicate the volume.

The scope of the treatise is shortly as follows :—A not unfriendly critic has assumed that my object in publishing it is merely to advocate a novel theory on the subject of enforcing foreign judgments. It is indeed necessary at the outset to examine two current theories, were it only from the fact that there are two ; it is doubly necessary since these two theories are diametrically opposed.

No surer guide through the mazes of juristic principles can be taken than Austin, I have therefore in the theoretical parts of the book worked on the basis of principles established by him, and have extended them into Private International Law, a field of labour which he necessarily left untouched. In investigating this subject my object has been, first to enquire into the nature of a judgment debt and its consequences : Secondly, to shew that, its nature being purely local or territorial, its consequences must be temporarily annihilated when circumstances render its execution within the territory impossible : Thirdly, to ascertain how far International Law is capable of supplying a remedy for this evil. The examination necessary for this purpose disclosed a principle lying midway between the two earlier theories to which allusion has been made. Having thus endeavoured at the outset to secure a firm footing, I have considered the numerous points of law and practice which have arisen, pointing out first the actual result of decided cases, and secondly how far they conflict with a principle which in my opinion underlies the whole fabric on which the theory of foreign judgment rests.

But in addition to the main principle, there is another—the question of Service out of the Jurisdiction—which is hardly of less importance, and which considerably complicates the subject. If all judgments were given in suits in which the defendant was resident in the jurisdiction, comparatively few pages would have served to dispose of the whole subject ; but the modifications of the ancient maxim of the Civil Law, *actor sequitur forum rei*, which the necessities of commerce have compelled the legislatures of all States to adopt, have given rise to a difficult question of jurisdiction, which in its turn has been complicated by the variety of the rules adopted : and as a large proportion of the foreign judgments which come before Courts of Law have been given in suits commenced according to these rules, it is necessary also to examine them as well as the principles of jurisdiction on which they are based.

Two main questions are therefore discussed in the following pages, the general theory of foreign judgments, and the right to commence actions against persons who are out of the jurisdiction : the scope of the work being now enlarged so as to comprise the practice both as regards foreign judgments and parties (both plaintiffs and defendants) out of the jurisdiction.

But questions of foreign law being so largely involved, the work even in this form would have been incomplete if it had been confined to English law : it therefore includes chapters on colonial, foreign and American law, containing much information which I have been enabled to collect since the publication in 1881 of the second volume of the first edition. I have also added the most important of the foreign decisions not only in these chapters but also in the main body of the book. The difficulty of collecting such information is very great, but the labour has been made more than light by the kind co-operation of friends whose services I cannot sufficiently acknowledge.

In compliance with a suggestion that some information with regard to the constitution and jurisdiction of the courts of foreign states would also be useful, I have as shortly as possible dealt with these matters at the commencement of the different sections on foreign law, my authority being Monsieur Demombyne's valuable work, '*Constitutions Européennes*.'

Such are the main principles involved in the subject : but there is one other to which too much importance cannot be attached, for it is involved in almost every section of the chapter on Defences. One Court of Justice must of necessity presume another Court of Justice to have acted well and justly : if this is forgotten, in the words of Lord Justice James, 'it would be impossible to carry on 'the business of the world.'

In conclusion, Professor Tyndall has said that a Theory is a principle or conception of the mind which accounts for observed facts, and which helps us to look for and predict facts not yet observed : That every new discovery which fits into a Theory strengthens it : That a Theory is not complete from the first, but a thing which grows as it were asymptotically towards certainty.

It may therefore not be inappropriate to trace the 'asymptotic 'growth towards certainty' which this Theory of Foreign Judgments has undergone.

Springing immediately from Lord Blackburn's judgments in *Godard v. Gray* and *Schibsby v. Westenholz*, although differing in one material point from those judgments, it furnished the solution of the conflict between the numerous authorities upon the subject of 'Enforcing' a Judgment :

It was of its own strength, capable also of solving the difficulty attending the subject of 'Recognising' a Judgment :

It supplied a ready answer to all the difficult problems arising from the varying defences which the ingenuity of learned counsel have suggested.

Expanded, it included in its application Judgments *in Rem* :

And finally, Judgments of *Status* ; coinciding in this last step with all the authorities.

It is not however without much diffidence that I venture to draw attention to, and to publish in a more extended form the results of a deeper investigation into this principle, for it has to contend with many received opinions. Of these the chief is that which treats the foreign judgment debt as an ordinary contract debt in England. The theoretical considerations contained in the first chapter will, I trust, show the fallacy involved in this. Once this notion is removed, many difficulties attending the rejection of certain defences will also disappear.

It must now bide its time, until that free conflict of discovery, argument and opinion has taken place, and won for it recognition.

The time for the discussion may indeed be now close at hand, for with the final proofs of these preliminary pages comes the announcement in Parliament that the Foreign Office has accepted the invitation to send delegates to a conference on the subject to be held under the auspices of the Italian Government.







# FOREIGN JUDGMENTS.

## CHAPTER I.

### Chapter I.

### THE ENGLISH DOCTRINE.

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Definition. By the term Foreign Judgment, we understand a judgment, decree, order or other adjudication that has been pronounced by a foreign court of competent jurisdiction; 'Foreign Court' including courts situate within the jurisdiction not only of alien states, but also of the British Colonies and possessions, of the Channel Islands, of the Isle of Man, and Consular Courts in Mahomedan countries.

'All judgments are foreign judgments which are given by 'courts whose jurisdiction does not extend to the territories 'governed by our laws.' (*McFarlane v. Derbyshire*—Upper Canada.)

*McFarlane v. Derbyshire*,  
8 Q. B. 12.

Scotch and Irish Judgments.  
31 & 32 V. c. 54.  
45 & 46 V. c. 31.

Judgments in Scotland and Ireland were formerly also considered as foreign judgments, but they are now, by the 'Judgments Extension Act, 1868' (31 & 32 Vic: c. 54), as to Superior Courts, and by the 'Inferior Courts Judgment Extension Act, 1882' (45 & 46 Vic: c. 31), as to Inferior Courts, made equivalent in their operation to English judgments: these acts, together with certain sections of a similar nature contained in other acts, will be considered hereafter. [See chapter xi.]

The preliminary distinction.  
*Romilly, M.R.*

The purport of this treatise is to consider what is the effect of a foreign judgment when it comes before an English court: how far the English courts will recognise the decisions of the courts of another jurisdiction;—and here it has been customary to recognise 'a preliminary distinction: where it is tried to enforce it; where 'it is pleaded as a bar to the proceedings instituted by the person 'who has failed against the same defendant, with reference to the 'same subject matter' (*Romilly, M.R., Reimers v. Druce*).

*Reimers v. Druce*,  
26 L. J.:  
Ch: 196.

This preliminary distinction points out the two ways in which such a judgment may come within the cognizance of an English court: it hints also at an unnecessary and purely arbitrary distinction often raised, and to be considered in due course, of treatment

Chapter I. according as this cognizance is obtained through the medium of plaintiff or defendant.

However there are these two recognised modes of obtaining in this country the benefit of a judgment pronounced in another. Judgment for plaintiff abroad. First, where there has been judgment for the plaintiff in an action abroad, by action to enforce it, brought by the successful plaintiff or his assignee; and the questions are: whether the English courts have power to enforce it, or as it is termed abroad, to grant an *exequatur* upon it: if this power exist, whether they will enforce it, and what principles will be taken as their guide in determining to what extent the defendant shall be allowed to answer the plaintiff's claim. Secondly, where there has been judgment for the defendant in an action abroad, and an action for the same cause is brought by the same plaintiff in an English court. For defendant. The successful defendant then produces the judgment in answer and claims the benefit of the decision already given in his favour as a bar to the new suit instituted against him; the question then is, how far the matter shall be treated as *res judicata*.

All countries are agreed upon one point, that until the foreign judgment is clothed by some means with an *exequatur* by the tribunals of the country in which it comes to be enforced it is of no effect: and this general principle is embodied in many of the Civil Codes of foreign countries, as will be seen in the chapter on foreign law [chapter xiii.] Thus section 2123 of the Code Napoléon declares that a judicial lien cannot arise from judgments given in a foreign country except to the extent to which they have been declared executory by a French tribunal. In some countries however the first method of securing the benefit of a foreign judgment noticed above does not obtain: in lieu of an action upon it they have provided in their Codes of Civil Procedure a special procedure for obtaining the *exequatur*; as for example *il giudizio di delibazione* in Italy. But although without doubt this is the more accurate method, in England there is no machinery as yet provided other than allowing an action to be brought upon the judgment as upon any other cause of action. It will be necessary to refer to this question again, but we may say at once that all the many difficulties which surround the question have their origin in this confusion of a foreign judgment with an ordinary cause of action. Foreign systems and procedure.

Reverting now to the preliminary distinction just noticed, although as we have said it is a purely arbitrary one, yet it has so long been recognised that the consideration of the question

will be materially facilitated if we base our divisions of the **Chapter I.** theoretical view of the subject upon it: we propose therefore to ——— consider separately,

Division of  
the subject.

THE ENFORCING—an action being brought upon the foreign judgment; and

THE RECOGNISING—the foreign judgment being pleaded in bar.

## I.

THE ENFORCING:—

The  
enforcing.

A foreign court has adjudged the defendant liable, say, to pay the plaintiff a certain sum of money: there is an obligation existing in the foreign country—to obey the decision of the court in that country: the defendant (supposing him to have been resident within the jurisdiction of the court) leaves the country without paying the money, and, leaving no property on which execution can issue, comes to England. The plaintiff finding the debtor in England, desires to make the English courts the medium for the recovery of the money already adjudged to be due to him.

The  
conflicting  
Theories.

Upon what principle can he do this? There has been much conflict of opinion: and the conflict is between two theories; one of which may be termed for convenience ‘the earlier,’ the other, ‘the later’ theory: although Judges of the present day have given their adhesion to the earlier doctrine.

Comity.

That doctrine is somewhat as follows: That we are bound by the COMITY of NATIONS to enforce here the decisions of foreign courts:—this is the earlier doctrine of ‘COMITY,’ pure and simple.

Obligation.

The later theory rejects altogether the notion of Comity, and asserts that the rationale of the enforcing these decisions by the English courts is, that a legal obligation has been created by the foreign judgment, which should, or must, be obeyed everywhere:—this is the doctrine of ‘OBLIGATION’ pure and simple.

Result of  
discussion  
anticipated.

We will discuss each doctrine separately, weighing the authorities on the one side and on the other: but we may venture here to anticipate the result of the discussion, and the conclusions at which we have arrived in this treatise, by stating—with some diffidence, contemplating the weight of the authorities to be contended with—that we consider that either doctrine is to a certain extent correct; but that neither is so correct as to conclude the whole subject.

DOCTRINE  
OF COMITY.

The doctrine of COMITY then is this:—that it is an ‘admitted principle of the law of nations, that a state is bound to enforce

- Chapter I.** 'within its territories the judgment of a foreign tribunal'—*Definition. Blackburn, J.*  
 (These are the words of Blackburn, J., in *Godard v. Gray*, when he was refuting the doctrine). The authorities on which it rests are as follow :—Lord Nottingham, C.:—'I said the merits of this 'case if the petitioner could come at it, were to examine a 'sentence of the Archbishop of Turin by the laws of England. 'It is against the law of nations not to give credit to the judgments and sentences of foreign countries, till they be reversed 'by law, and according to the form of those countries wherein 'they were given. For what right hath one kingdom to reverse 'the judgment of another? and how can we refuse to let a 'sentence take place till it be reversed? and what confusion 'would follow in Christendom, if they should serve us so abroad 'and give no credit to our sentences' (*Anon.*). Lord Ellenborough, C.J., in *Alves v. Bunbury*:—'By the *comitas gentium*, *Ld: Ellenborough, C.J.* 'the courts of different countries will recognise and enforce the 'judgments of each other: but they must be authenticated.'  
*Anon.*  
 2 Sw: 326 n.  
*Alves v. Bunbury.*  
 4 Camp: 28.  
*Power v. Whitmore.*  
 4 M. & S. 141.  
 And again in *Power v. Whitmore*:—'By the comity which is 'paid by us to the judgment of other courts abroad, we give a 'full and binding effect to such judgments, as far as they profess 'to bind the persons and property immediately before them in 'judgment, and to which their adjudications properly relate.'  
 Lord Kenyon, C.J., in *Geyer v. Aguilar*:—(The judgment was *in rem*, pronounced by a French Admiralty Court: but the judgments of both Lord Kenyon, C.J., and Ashurst, J., are of general application to all foreign decisions). 'We decide this 'case bound and shackled by certain rules from which we dare *Ld: Kenyon, C.J.* 'not depart. Civilised nations profess to be governed by certain 'rules, and the comity due from the courts in one country to 'those in another induces them to give credit to each other's 'acts. There is the same comity between the different courts 'in this kingdom.' And Ashurst, J.:—'The judgment of a 'foreign court, whether it be the court of a country at enmity *Ashurst, J.* 'or in amity with us, is conclusive if the same questions arise 'again here.' Pigot, C.B., in *Maubourquet v. Wyse*:—'The *Pigot, C.B.* 'Comity of Nations requires that we should give effect to such 'a judgment.' Cockburn, C.J., in *Castrique v. Imrie*:—The *Cockburn, C.J.* 'Comity of Nations, by virtue of which alone the judgments of 'the tribunals of one country are respected in those of another.'  
 Sir G. Jessel, M.R., in *Dawkins v. Simonetti*:—'The effect of 'the judgment of the Neapolitan court if fairly obtained will be *Jessel, M.R.* 'that it will be followed by the English court by reason of the



‘Comity of nations.’ Sir R. Phillimore, in *Messina v. Petro-* **Chapter I.**  
*cocchino*, (delivering the judgment of the Privy Council and  
 approving the doctrine as enunciated by Lord Ellenborough,

*Sir R. Phil-  
 limore.*

C.J.):—‘It is to be observed that, though the earlier cases

*Messina v.  
 Petrococ-  
 chino.*  
 L. R. 4  
 P. C. 144.

‘exhibit some fluctuation and variety with respect to the appli-  
 ‘cation of this doctrine; it has become firmly established by a  
 ‘series of later cases as an unquestionable maxim of our juris-

*Ld:  
 Brougham,  
 C.*

‘prudence.’ Lastly Lord Brougham, C., in *Houlditch v. Mar-*  
*quess of Donegall*:—‘A judgment of a foreign court of record

*Houlditch v.  
 Donegall.*  
 2 Cl. & Fin.:  
 470.

‘may be made the ground of proceeding in the courts of this  
 ‘country; and the great rule of all civilized countries among  
 ‘each other is, that a judgment in any one of them may be made  
 ‘the ground of proceeding validly and with effect in this country.’

Of the objections to this doctrine of Comity, perhaps the most  
 important is, its uncertainty and vagueness; and consequent  
 upon this uncertainty, the difficulty of establishing what can be  
 received as a defence to the action. It is impossible to define  
 its limits. There existed the principle *in nubibus*: there existed  
 arbitrary exceptions to it, each case depending upon the discre-  
 tion of the Judge: The ultimate limit, that we were *bound* to  
 enforce by reason of the Comity, seemed to suggest the difficulty,  
 if bound, how could a defence possibly be admitted:—this  
 appeared to be a manifest injustice: One defence and then  
 another came to be allowed, till at last one was invented—to  
 be more fully considered hereafter—that Natural Justice had  
 been violated by the foreign court, and would be violated if the  
 English court enforced the judgment.—Thus Lord Kenyon, C.J.,  
 in *Galbraith v. Neville*, referring to *Isquierdo v. Forbes* said:—

Its un-  
 certainty.

Its apparent  
 limits.

‘To say that Lord Hardwicke could alter or open the discussion  
 ‘of the rights which had been finally and lawfully settled by the  
 ‘Welsh court, is a position against which I must enter my  
 ‘protest.’ The learned judge gave expression to the full and  
 binding force of the doctrine; yet in the same case Buller, J.,  
 said:—‘I have often heard Lord Mansfield repeat what was  
 ‘said by Lord Hardwicke in *Isquierdo v. Forbes*: and the ground  
 ‘of his Lordship’s opinion was this:—When you call for my  
 ‘assistance to carry into effect the decision of some other  
 ‘tribunal, you shall not have it, if it appears that you are in the  
 ‘wrong, and it was on that account that he said he would examine  
 ‘into the propriety of the decree.’ Here was the other extreme;  
 and this seemed to suggest the difficulty, that almost everything  
 that could be alleged against the judgment might be brought

*Galbraith v.  
 Neville.*  
 1 Dougl: 6 n  
*Isquierdo v.  
 Forbes.*  
 1 Dougl: 5 n.



Chapter I. under the words 'if you are in the wrong,' and would have to be admitted as a defence.

No better witness to the vagueness of the doctrine and misuse of the word 'comity' is wanted than the following extract from Story:—'In a suit brought by a party to enforce a foreign judgment, it is often urged that no Sovereign is bound *jure gentium* 'to execute any foreign judgment within his dominions; and 'therefore, if execution of it is sought in his dominions, he is at 'liberty to examine into the merits of the judgment, and to refuse 'to give effect to it, if upon such examination it should appear 'unjust and unfounded. He acts in executing it upon the 'principles of comity; *and has therefore a right to prescribe the 'terms and limits of that comity*' [Conflict of Laws, § 598].

Its vagueness.  
Story, § 598.

What is this Comity of Nations? Its essential, nay its only characteristic is mutuality, or universal reciprocity. If there be such a thing, it must exist as a governing and mutual principle, and cannot be subject to variation at the will of one Sovereign, without also suffering a corresponding variation on the part of the Sovereign of the other state, the relations between them being reversed. And not only this; it is 'of Nations': for there is not one comity between certain states, and another comity between certain other states; but one for them all. A variation or diminution at the will of one Sovereign, or agreed to between two Sovereigns, would necessarily vary or diminish the comity existing between all other states. Thus successive prescriptions of the terms and limits of comity in its application to any particular subject, would in the end annihilate it with reference to that subject.

What is Comity?  
Reciprocity essential.

*Schibshy v. Westenholz*,  
L. R. 6  
Q. B. 155.

This essential reciprocity is noted by Blackburn, J., in *Schibshy v. Westenholz*:—'If the principle on which foreign judgments are enforced be what is loosely termed a comity,\* we could hardly decline to enforce a foreign judgment given in France against a resident in Great Britain under circumstances hardly, if at all, distinguishable from those under which we, *mutatis mutandis*, might give judgment against a resident in France:—but it is quite different if the principle be that which Baron Parke has laid down': This leads us to the consideration of the doctrine of OBLIGATION.

Blackburn, J.

\* Notwithstanding his violent denunciation of comity, Blackburn, J., in *Castrique v. Behrens*, said in argument:—'The reason that there would be inconsistent judgments if the first were allowed to be impeached, by the 30 L. J. Q. B. 163. 'Comity of Nations would equally apply to a foreign judgment.'

DOCTRINE  
OF OBLIGA-  
TION.

The defini-  
tion of  
*Parke, B.*

Approved by  
the full  
Court of  
Queen's  
Bench.

It is capable  
of sharp  
limitation.

*Blackburn,  
J.*

But requires  
careful  
examination;  
especially as  
to the terms  
used.

'Common  
Law.'

*Blackstone's*  
definition.  
*Stephen's*  
ed: vol. 1.  
p. 10.  
p. 41.

This doctrine came into being in 1845, in the case of *Russell v. Smyth*, where it was first enunciated by Parke, B., and repeated by him in *Williams v. Jones*. The learned Baron's judgment in the latter case was as follows:—'The principle in this case is, that 'where a competent court has adjudicated a certain sum to be 'due, a legal obligation arises to pay that sum, and an action 'of debt to enforce the judgment may be maintained. It is in 'this way that the judgments of foreign and colonial courts may 'be supported and enforced.' This was approved, as we have seen, in 1870, in the two cases of *Godard v. Gray*, and *Schibshy v. Westenholz*; by Blackburn and Mellor, JJ. in the former; and by Blackburn, Mellor, Lush and Hannen, JJ. in the latter:—'It 'is not an admitted principle of the law of nations that a state is 'bound to enforce within its territories the judgment of a foreign 'tribunal. Several of the continental nations (including France) 'do not enforce the judgments of other countries, unless where 'there are reciprocal treaties to that effect. But in England, and 'in those states which are governed by the Common Law, such 'judgments are enforced, not by virtue of any treaty, nor by virtue 'of any statute, but upon a principle very well stated by Baron 'Parke' (*Godard v. Gray*).—'The judgment of a court of com- 'petent jurisdiction over the defendant imposes a duty or obliga- 'tion on him to pay the sum for which judgment is given, which 'the courts in this country are bound to enforce' (*Schibshy v. Westenholz*).

Here then we have a sharply defined principle; and consequent upon its certainty, a possibility of clearly tracing strict rules for the admission or rejection of defences to the action:—'Anything 'that negatives the existence of the legal obligation, or excuses ' (or forms a legal excuse for) the performance of it, must form a 'good defence to the action.' (Blackburn, J.)

But however convenient the application or the result of the principle, the principle itself and the rule based upon it must be examined attentively.

Two terms have been used which require explanation: 'Com- 'mon Law'—'Legal Obligation.'

What are we to understand by the phrase, 'England and those 'states which are governed by the Common Law'?

In England there is 'an ancient collection of unwritten maxims 'and customs which is called the Common Law,' as distinguished from Acts of Parliament, or Statute Law. 'These customs receive 'their binding power, and the force of laws, by long and im-

Chapter I.

*Russell v. Smyth.*  
9 M. & W.  
810.  
*Williams v. Jones.*  
14 L. J.  
Ex: 145.

*Godard v. Gray.*  
L. R. 6  
Q. B. 139.  
*Schibshy v. Westenholz.*  
L. R. 6  
Q. B. 155.

**Chapter I.** 'memorial usage, and by their universal reception throughout the 'kingdom.' Blackstone always uses Common Law as meaning *the proper Law of England*, and as expressing 'the institutions' p. 45. 'which are not founded on any known statute, but upon custom 'only.' So we may take it, that in countries where there is no code, if the courts acknowledge the existence of any mass of ancient customs and unwritten maxims, this is the Common Law of that country. The English Colonies adopt English Common Law. In the United States the courts recognise as Common Law those customs and maxims which were Common Law to the English courts at the time of the Declaration of Independence. In Germany there is a Common Law, though it is rapidly giving way to a series of codes.

Thus we see, that the 'Common Law' referred to by Blackburn, J., *may* be taken to mean, a series of ancient customs and unwritten maxims, common to the Common Laws of different states; in other words, a *Jus Gentium*. And adopting this interpretation of the term, Baron Parke's proposition may be thus paraphrased:—in the brotherhood of states acknowledging this Supreme Common Law, there is among its citizens a common right to use the first Court of Justice that is handy to them, to enforce a decision obtained in any other court: That the judgment, *quâ* the plaintiff, is a thing to be carried, as it were, in the pocket and enforced anywhere;—*quâ* the defendant, is the badge of the necessary obedience to it, which may be compelled anywhere at the pleasure of his adversary. Can such a thing exist? or rather, does it exist? It is a state suggestive of the description of civil laws, which Hobbes gives in his 'Leviathan':—'By civil 'laws, I understand the laws that men are bound to observe, 'because they are members, not of this or that commonwealth in 'particular, but of a commonwealth.'

One sense of the term may be equivalent to *Jus Gentium*.

Consequent effect of the principle.

Hobbes' definition of civil laws.

But, assuming that all that is to be understood by this phrase, is—those states where English Common Law prevails, the learned Baron's doctrine takes another form which is dependent solely on the nature of that law, and not on the rules to be discovered in a hypothetical *Jus Gentium*:—There is a judgment pronounced by a court having authority to do so: there is therefore raised by this judgment a legal obligation to obey it: (using this term 'legal obligation' in the sense that Blackburn, J., has used it). This legal obligation is in fact, to pay the debt which the foreign court has pronounced to be owing: The English court cannot but suppose that the foreign court has acted rightly, and it has

The other sense in which the term may have been used.

The moral obligation enforceable

by English  
Common  
Law.

declared the debt to be owing; therefore, in the eyes of the English courts, there *is* a debt owing: Brought before them, the legal obligation becomes a moral obligation: There is among the ancient unwritten maxims of our English Common Law—which is a moral law—one maxim, ‘render to everyone his due.’ That maxim must be applied, and the defendant who would evade his country’s just decision, must be compelled to obey that judgment, even though he is beyond the jurisdiction of the Court that has pronounced it; he must pay the debt he owes:—And that this is no exaggerated exposition of this phase of the doctrine of obligation, we may cite the dictum of Lord Abinger, C.B., in *Russell v. Smyth* (the same case it is to be remembered, that originated Baron Parke’s enunciation of the doctrine):—‘Foreign judgments ‘are enforced here, because the parties against whom they are ‘pronounced, are *bound in duty* to satisfy them.’

Chapter I.

*Russell v. Smyth.*  
9 M. & W.  
810.

*Austin.*  
Jurispru-  
dence, I.  
p. 467.  
Duty—its  
derivation.

Austin thus distinguishes between duty and obligation in its strict sense. ‘The English *duty* (looking at its derivation) rather denotes *that* to which a ‘man is obliged, than the obligation itself. It is derived through the French ‘*devoir* (past part :) and the Italian *dovere*, from the Latin *debere*. It is, ‘therefore, equivalent to *id quod debitum est*, rather than to *obligatio*.’

p. 224.

This dictum of Lord Abinger much resembles that ‘example from Lord ‘Mansfield, of the tendency to confound positive law with positive morality, ‘and both with legislation and deontology’—which Austin quotes. ‘By ‘the English law, a promise to give something or to do something for the ‘benefit of another is not binding without what is called a consideration, ‘that is, a motive assigned for the promise, which motive must be of a ‘particular kind. Lord Mansfield, however, overruled the distinct pro- ‘visions of the law by ruling that moral obligation was a sufficient considera- ‘tion. Now moral obligation is an obligation imposed by opinion, or an ‘obligation imposed by God: that is, moral obligation is anything which we ‘choose to call so, for the precepts of positive morality are infinitely varying, ‘and the will of God, whether indicated by utility or by a moral sense, is ‘equally matter of dispute. This decision of Lord Mansfield, which assumes ‘that the judge is to enforce morality, enables the judge to enforce just what- ‘ever he pleases.’

Obligation.  
and  
sanction.

Now, every obligation imports a sanction :

A moral obligation, a moral sanction :—a legal obligation, a legal sanction.

Let us for one moment revert to the two phases of the doctrine of obligation which we have been considering. In the first, we found the obligation of obedience to the judgment out of the country was based upon an all-pervading *Jus Gentium*:—there must then also exist a *Jus Gentium* sanction, the power of enforcing which would reside in the Sovereign Authority of all states acknowledging the authority of this *Jus Gentium*.

**Chapter I.** In the second, we find the foreign obligation with its foreign sanction. But when the obligation leaves the country of its origin, or rather, when the person obliged leaves that country, of necessity the sanction remains behind ; therefore coming before the Courts in England or in a state which is governed by English Common Law, this obligation comes to be regarded as a moral obligation, and is clothed with a new sanction, one of English Common Law, the power of enforcing which resides in the Sovereign Authority of England, or of the states acknowledging the authority of English Common Law.

But these notions are altogether inconsistent with the proposition that every obligation imports a sanction : This proposition implies that not only is a sanction connected with every obligation that is created, but that it is inseparably connected with it. The obligation cannot exist without its sanction ; nor the sanction without its parent obligation. To shift one, is also to shift the other ; to destroy, or avoid one, is also to destroy or avoid the other. Can then either obligation or sanction be shifted from one jurisdiction to another by shifting of residence by the person obliged ? The judgment is pronounced in the foreign state :—the sanction comes into being in the foreign state :—but the sanction, that is, the liability to evil, not only resides in the foreign state, but *is enforced* by the Sovereign Authority of that state ; and from its very nature *by that Sovereign Authority alone* : The enforcement of its proper sanctions is of the essence of the Sovereignty ; it cannot be taken out of it : Therefore, since the enforcement cannot be removed, neither can the sanction ; neither can the obligation : The whole system, Judgment, Obligation, Sanction, Enforcement of the Sanction, forms the unit, which is indivisible.

Sanction and obligation are inseparable.

The juridical unit.

Therefore, the conclusion is obvious, that a judgment debtor of a foreign state, leaving that state, must leave behind the legal obligation (using this term in its strict sense) of obedience to the judgment which has created the obligation : and further, that coming into this country, he cannot be considered a legal debtor here, but only a legal debtor of and in the foreign state.

Conclusion.

This brings us to the destruction of the obligation, that is, the avoidance of the sanction or evil to which the person obliged has rendered himself liable.

Destruction of obligation, and avoidance of sanction.

And first, the liability to evil (or further evil) is naturally avoided by obedience to the judgment, and consequent destruction of the obligation by fulfilment.



But from what has already been advanced, it is evident that there is a method of avoiding the liability to evil in a temporary manner, with a consequent temporary destruction of the obligation: that is, (presupposing, of course, an absence of property there on which execution may issue) by leaving the country; (the case of a defendant resident abroad, being subject to the jurisdiction of the court by submission or otherwise need not be noticed at this stage). This temporary avoidance and destruction will continue so long as the defendant's absence continues, and will of course be revived by a return to the country.

DOCTRINE  
OF 'OBLI-  
GATION AND  
COMITY.'  
Its  
inception.

But it is manifestly unjust to the judgment creditor, and derogatory to the dignity of the State that such a simple expedient of avoiding the sanction should be tolerated; some remedy must be found:—The debtor has fled to another state; that state must be asked to enforce a sanction which is foreign to its authority; in other words, it must be asked to lend the aid of its courts to clothe the foreign obligation with a sanction of its own; this will be a great convenience to the country whose sanction is to be enforced; in return, the position being reversed, it also will enforce the sanctions of the other state.

This, though a purely theoretical view of the foundation of the comity, does still in fact take place when a *commission rogatoire* issues from one court to another in a foreign state.

Phillimore's  
General  
Axiom.

Sir R. Phillimore—International Law—Vol. IV. MDCCCXXX; 'General Axiom'—No state allows a foreign judgment to be executed within its territory, except under the authority, and by order of its own tribunal. The practice of states varies, whether the judgment is executed at the instance of the party (*simple demande* or *requête*): or by formal requisition of the Foreign Tribunal (*commission rogatoire*).

Woolsey  
Int. Law,  
§ 24.

Now this process of inter-state arrangement being repeated between these and other states, would in time become an inter-state, or international custom: and, being a custom which is essentially courteous, and being reciprocal, it is a custom which falls under the head of International Courtesy or Comity; in other words, what is generally understood by Comity of Nations: the widest definition of which is—'all those praiseworthy acts of one nation towards another which are not *stricti juris*: i.e., all 'that the refusal or withholding of which, although dictated by malevolence is not an injury, and so, not a ground of war.' To the conclusion at which we have already arrived, that the judgment-debtor of one state cannot be regarded as a legal debtor in another, we may therefore add—that a state where such debtor is

Chapter I. found, will lend its aid to enforce the sanction ; or rather, will  
 ——— clothe the foreign obligation with a sanction, which while the  
 debtor remains in that state, will stand in the place of the one the  
 foreign state is powerless to enforce. Further  
conclusion.

Between some states, as will be seen in chapters xiii and xv, Treaty.  
 there exist treaties by which they mutually enforce the judgments  
 of each other : It is easy to see how Comity is here replaced by  
 Treaty.

Nor is this practice unreasonable or impolitic :—For sanctions Sanctions  
classified.  
 may be classified into ‘intermediate sanctions’ ; the consequences  
 of disobedience to a judgment, which are recognised by courts of  
 civil procedure, and occasionally by those of criminal procedure :  
 and ‘ultimate sanctions’ ; the consequences of disobedience to  
 the law of the land, which are declared by the sentence of courts  
 of criminal procedure ; and more rarely, the penalties adopted in  
 extreme cases by those of civil procedure.\*

For example, a judgment is given that one man pay another a Intermediate  
sanctions.  
 certain sum of money, execution stayed for four days : that is to  
 say, if the judgment be disobeyed, the debtor will be liable to the  
 evil of an execution. This is the intermediate sanction of the Civil.  
 Civil Courts.

Again, a man is ordered to keep the peace for six months,  
 recognizances being entered into : that is to say, if within six  
 months the peace be broken, the recognizance becomes liable to  
 be estreated. This is an example of the intermediate sanction of Criminal.  
 the Criminal Courts.

Or again, taking an old form, a judgment is given that one man Ultimate  
sanctions.  
 pay another a certain sum of money within a week, or in default  
 to go to prison till it be paid : that is to say, if the judgment be  
 disobeyed, the debtor will be liable to the evil of imprisonment till  
 it be obeyed. This was the ultimate sanction of the Civil Courts Civil.  
 in days gone by.

Lastly, there are the sentences of the Criminal Courts—Law Criminal.  
 now takes the place hitherto occupied by Judgment, and the  
 juridical unit becomes :—Law [a thing shall not be done] ; cf. p. 11.

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\* Markby's classification of sanctions [Elements of Law, p. 241], which was  
 made use of in the first edition is not thoroughly scientific, confusing as it does  
 the real meaning of the words Judgment, Obligation, Sanction. The terms  
 ‘intermediate’ and ‘ultimate’ have however been retained for the sake of con-  
 venience, although the explanation of the classification of sanctions as now  
 given differs very materially from that given on p. 14, vol. I. [1st edition].  
 The result of the argument, for the purposes of which the classification is intro-  
 duced, remains unaltered.

Obligation [not to do that thing] ; Sanction [the liability to evil if that thing be done] ; Enforcement of the Sanction [the evil itself, in form of trial, sentence and punishment]. Thus if the Law be disobeyed by anyone, he becomes liable to the evil of a punishment, [sentence of fine, imprisonment or death,] the ultimate sanction which it is the prerogative of the Courts of Criminal jurisdiction to enforce. Chapter I.

Ultimate sanction in criminal cases to be enforced by state of origin.

Discretion as to enforcement of it. *Austin* l. p. 518.

In the case of an escaped criminal, it would be unreasonable and impolitic to ask a foreign state to enforce the ultimate sanction by imprisonment or death in that state; no benefit could accrue therefrom, for the man has committed no crime in the foreign state: it is in the state to which he is subject that he has committed the offence; and it is in that state, and by the Sovereign Authority of that state alone that the penalty can be inflicted, and the wrong to that community be vindicated. Moreover, the sanction in criminal cases is enforced or remitted at the discretion of the sovereign.

Extradition.

In order therefore that such vindication may be effectually consummated in and by the country whose laws have been violated, there have been made Extradition Treaties between states. By these Treaties, not only are escaped criminals handed over to their own governments to receive punishment, but also suspected persons in order to take their trial.

Considered theoretically.

This result might also have been arrived at, by the same process as before: thus, the recovery of criminals may have been effected, first, by mutual arrangement; which, having solidified into a rule of International Comity, has finally given way to Treaty. But, on account of the paramount importance to the community of each state, of having its own violated laws vindicated before its eyes, Treaties have become almost universal between civilised states. Indeed, Story asserts that the practice has 'beyond question, prevailed as a matter of Comity, and 'sometimes of Treaty, between some neighbouring states; and 'sometimes also between distant states having much intercourse 'with each other.' [Conflict of Laws, § 626.]

Story, § 626.

Discretion as to enforcement of intermediate civil sanction.

But in civil cases there is no such necessity; the wrong is not against the community at large, but against an individual; the vindication of the wrong affects the individual not the community. The sanction, though resident in the Sovereign Authority, is enforced at the instance and discretion of the injured party, and will not be enforced unless he put the Sovereign Authority in motion. So long however as he has redress when he demands it,



**Chapter I.** it is a matter of little moment either to him or to the community how or where he obtains it: the community has really no interest in the matter; for although the remote or paramount end of an intermediate civil sanction must naturally be the general prevention of offences committed by one man against another of the same community, whilst of an ultimate criminal sanction it is the general prevention of offences by one man against the community of which he is a member; yet it does not affect the interests of the community when the redress obtained by its injured member is in fact obtained, its own action being paralysed, through the instrumentality of another state, whose course of action has been guided by the principles of an International Courtesy.

Our conclusion may now be stated in the form of a proposition:—States lend their aid mutually to enforce each other's judgments:—

The proposition stated,

*There is a legal obligation* existing against the debtor in the state where the judgment has been pronounced; the obligation has been disobeyed. By reason of the debtor's absence from the jurisdiction of its courts, and there being no property on which execution can issue, the state is unable to enforce the sanction.

*By virtue of the Comity of Nations*, a foreign state, to which the debtor has gone, will clothe the obligation deprived of its correlative sanction, with another sanction auxiliary to it: and by so doing will endue it with the power resembling that which it has lost.

This I have called the doctrine of OBLIGATION AND COMITY.

and a third doctrine suggested.

Before fully considering this new doctrine, its advantages may be briefly stated: but we must bear in mind that a doctrine, however advantageous, should not be accepted, if it is based upon erroneous principles.

It will be observed to combine the earlier and the later doctrines: adding to the broad but indefinite international principle of Comity, the precision of the legal principle of Obligation.

Its chief advantage.

Summing up the arguments that have been used, the principles upon which the doctrine is founded are as follows:—

a. A court of competent jurisdiction has pronounced a judgment:—

Principles involved in the doctrine of Obligation and Comity.

therefore, an obligation and sanction have arisen.

b. The defendant and the defendant's property are both out of the jurisdiction of the court: the sanction is absolutely fixed in the Sovereign Authority:—

therefore, the sanction cannot be enforced.

c. The defendant is within the jurisdiction of a foreign state : **Chapter I.**

The Comity of Nations has created a second, or auxiliary ———  
sanction, resident in the foreign Sovereign Authority :—  
therefore, this sanction may be enforced against the  
defendant, at the discretion and instance of the judgment  
creditor.

Principles it  
negatives.

And the principles which it negatives are those contained in the  
two views of Lord Blackburn's theory, above enunciated : viz :—

First view of  
doctrine of  
Obligation.  
cf : P. 9.

a.' A court of competent jurisdiction has pronounced a judgment :—

therefore a *Jus Gentium* obligation and sanction have  
arisen.

b.' The defendant is out of the jurisdiction of the court :—

therefore the *Jus Gentium* obligation and sanction have  
accompanied him.

c.' The defendant is within the jurisdiction of a foreign state  
acknowledging this *Jus Gentium* : The same *Jus Gentium*  
sanction which has once been created, is also resident in  
the foreign Sovereign Authority :—

therefore this sanction may be enforced against the  
defendant, at the discretion and instance of the judgment  
creditor. Or—

Second view  
of doctrine of  
Obligation.  
cf : P. 9.

a." A court of competent jurisdiction has pronounced a judgment :—

therefore a debt and universal duty to pay have arisen.

b." The defendant is out of the jurisdiction of the court :—

therefore he carries with him the debt and duty to pay.

c." The defendant is within the jurisdiction of a foreign state  
acknowledging the principles of 'English Common Law' :  
The mere existence of a debt and duty to pay anywhere  
creates an 'English Common Law' sanction, resident  
in the foreign Sovereign Authority :—

therefore this sanction may be enforced against the  
defendant at the discretion and instance of the judgment  
creditor.

Doctrine of  
Comity not  
negated  
but defined.

It does not negative the *fundamental principle* of the old  
doctrine of Comity ; but it defines positively and clearly what is  
enforced.

The principles *a* and *b* have already been discussed : *c* remains  
to be more fully considered.

A second or *auxiliary sanction* is created :—

**Chapter I.** Now this at first sight seems to create the difficulty, that we have a sanction resident in and enforced by a Sovereign Authority, without a correlative obligation created in the jurisdiction and by the courts of that Authority. In reality, this is not so: the word 'auxiliary' tends to remove the apparent difficulty.\*

The auxiliary sanction examined.

Now, a sanction is understood to reside in the Sovereign Authority of the State: as we have said, its existence is an essential characteristic of Sovereignty: More accurately, it is one of the powers, the aggregate of which, possessed by the rulers of a political society, is called Sovereignty.

Markby, p. 3.

The origin of this aggregate of powers is that habitual obedience to the government which is rendered by the bulk of the community. The habitual obedience is partly the consequence of custom, and partly the consequence of prejudices. It is this obedience that causes the government to exist in the form of a monarchy, or of a popular government, according to the tendency of these prejudices. This obedience is also bottomed in the principle of utility;—for positive moral rules are uncertain, scant, and imperfect: Hence the necessity for a common governing (or common guiding) head to whom the community may in *concert* defer.

An analogy traced between Law proper and International Law, cf: Austin, Lect: VI., p. 302 and note 28.

It is indeed possible to conceive a society in which legal sanctions would lie dormant; or in which *quasi*-government would merely recommend or utter laws of imperfect obligation (in the sense of the Roman Jurists). But however perfect and universal the inclination to act up to rules tending to the general good, it is impossible to dispense with a governing or guiding head. Upon this obedience, therefore, depends the existence of the sanction.

Again, taking the aggregate of Sovereign Authorities, popularly known as the Family of Nations: The members of this great Family are the Governments of the various States. But there is no Supreme Sovereign Authority, for all the members are considered equal: but there is a body of rules to which all profess habitual obedience, called International Law, the ultimate sanction of which is war: and a lesser body of rules simply regulating the courtesy of intercourse between the members, which all do habitually obey, called the rules of International Courtesy, or the Comity of Nations; these rules have not war as their ultimate sanction.

*Laneuville v. Anderson*  
30 L. J.: P.  
& M 25.  
*Enohin v. Wylie*.  
31 L. J.:  
Ch: 402.

\* There is authority for the use of the word 'auxiliary': see Sir C. Cresswell in *Laneuville v. Anderson*, and Lord Westbury in *Enohin v. Wylie* [post p. 311].

The origin of this *quasi*-sovereignty (the personality of which Chapter I. does not exist) is also habitual obedience rendered by the bulk of the Community of States. This obedience is partly the consequence of custom (but not of prejudices), and is also bottomed in the principle of utility.

Now we have seen that a power (assumed at the request of the other states one by one) resides in every member of the Community of States, to enforce the judgments of other states by means of an auxiliary sanction, and this has now become part of the Comity of Nations.

Result of the theory.

The result is, that not only is an obligation created, the sanction correlative to which is resident in the Sovereign Authority of the State whose courts have pronounced the judgment, and which may be enforced there at the discretion and instance of the judgment creditor ; but there also comes into being in every other state a bare obligation—resembling somewhat the *nudum pactum* of the Roman Law—which, when the judgment debtor enters any Foreign State, is clothed with an auxiliary sanction, enforceable by the Sovereign Authority of that State at the discretion and instance of the foreign judgment creditor ; and dependent upon International Comity.

Necessity for an application to the courts of the foreign state.

But although a sanction in the country of its origin is enforceable through the medium of the courts without further application to them, in this case application to the courts of the Foreign State is necessary, in order to establish to the satisfaction of the Sovereign Authority in whom the auxiliary sanction is resident, the fact that the foreign obligation does in reality exist.

The principle of defence to the action.

The doctrine of Obligation and Comity is therefore, we venture to think, complete in all its parts: The theory of the existing obligation and the theory of the auxiliary sanction created by comity both appear to be sound : There is no difficulty in at once adopting (subject to the criticism to be made upon it hereafter : see p. 104) Lord Blackburn's definition of the essentials to a good defence, because the practical part of the doctrine of obligation remains entire. Therefore, as before stated, we may for the present take those essentials to be, 'to negative the existence of the obligation' ; or to 'excuse the performance of it.'—What defences may be raised, will be considered in chapter iv.

Comity being accurately defined, Lord Blackburn's

Lastly ; is the doctrine of Obligation and Comity open to the objection taken by Lord Blackburn to the earlier doctrine of Comity pure and simple ? 'If the principle be what is loosely 'called a comity.'—We have endeavoured to define accurately

**Chapter I.** what this comity among nations is, and to shew that 'loosely' is no longer a term to be applied to it. But we have not yet traced to its source that courtesy which in reality is interchanged. Once more we must quote the learned judge :—'If the principle be what is loosely called a comity, we could hardly decline to enforce a 'foreign judgment given in France against a resident in Great Britain, under circumstances hardly, if at all, distinguishable from 'those under which we, *mutatis mutandis*, might give judgment 'against a resident in France.' (*Schibsy v. Westenholz*.) The reference is to the Common Law Procedure Act, 1852, sections 18 and 19, relating to service out of the Jurisdiction. Under that Act, a certain course was to be pursued (which has been varied by the Judicature Acts) in certain cases against a non-resident defendant. Supposing the courts of another country should proceed against an Englishman not resident in that country, in a manner 'hardly 'if at all distinguishable' from our own method; Then, said Lord Blackburn, we should be bound to enforce it, were we fettered by this loosely-termed comity.

objections  
no longer  
exist.

*Schibsy v.  
Westenholz*,  
L. R. 6 Q.  
B. 155.

Procedure  
against non-  
resident  
defendants.

The words 'circumstances hardly if at all distinguishable' seem, with the very greatest respect to the learned judge, somewhat confusing. The point in which the circumstances of the two cases we shall now consider are distinguishable is really the key to the whole position, and illustrates the fallacy involved in the principle of the decision in *Schibsy v. Westenholz*.

First :—The courts of another country desirous of summoning a non-resident Englishman, proceed on the method laid down by its legislature, which method may be very different from the English procedure regarding absent defendants. Second :—But, assuming the rules obtaining in the other country to be less comprehensive than the English rules, suppose the courts of that country summon a non-resident Englishman, not according to its own rules, but *according to English rules*.

'Fettered by comity we should be bound to enforce' the judgment in the first case. And where would be the hardship or incongruity? English law contains rules affecting foreigners (rules, as we shall see, far in advance of those adopted in other countries, France alone excepted). Why should not a foreign state (not a foreign court), *mutatis mutandis*, enact rules affecting Englishmen? Comity would insist, and rightly, that a judgment in accordance with those rules should be enforced in England.

Lord Black-  
burn perhaps  
pointed to  
an adoption  
of *lex ta-  
lionis* by  
foreign  
court.

But the second case is very different. Whether or no it was in the learned judge's mind, it is not so far-fetched as may at first



sight appear, for such cases are of frequent occurrence in Italy. **Chapter I.**  
[See the cases quoted upon the subject in 'Italy,' p. 483.]

The foreign court has forsaken its own law and adopted the *lex talionis*. Retribution, or the right of retorsion as it is sometimes called, forms no part of the system of comity; and therefore, although we are bound and shackled by the rules of comity from which we dare not depart, yet these rules themselves expressly show that a judgment given under such circumstances should not be enforced in any other country.

So, from the particular to the general, if a foreign court, following its own peculiar law or procedure, pronounce a judgment against an Englishman, then that judgment, coming before the English courts, should be upheld and enforced; and *vice versa*: first, under the influence of the Comity of Nations; secondly, on account of the obligation created.

The courtesy  
that is inter-  
changed.

This then is the logical deduction from the principle which we have advocated: The courts of different states, by courtesy enforce, each for the other, not *lex* for *lex*, but *jus* for *jus*.

Practical  
illustrations  
of doctrine  
*jus* for *jus*.  
Rights of  
assignees in  
foreign  
bankruptcy.

No better illustration of this doctrine could be found than the case of *Alivon v. Furnival*. It was an action on a French arbitral sentence and ordinance of court confirming it, by which the defendant was ordered to pay a certain sum of money to two out of three syndics of a French bankrupt. It was established that by French law, two out of three syndics are allowed to sue in their own names alone, without alleging or giving evidence of the absence or incapacity of the third, and without any previous authority of the Juge Commissaire. Parke, B., said:—'This is a peculiar right of action created by the law of France; and we think it may by the Comity of Nations\* be enforced in this country; as much as the right of foreign assignees or curators, or foreign corporations, appointed or created in a different way from that which the law of this country requires.' The same principle was acted on in *Tenon v. Mars*.

*Alivon v.*  
*Furnival*,  
3 L. J.  
Ex: 241.

Now under the English Bankruptcy Law, when more than one trustee of a bankrupt's estate has been appointed, there being no authorisation to the contrary, all the trustees would of necessity be joint plaintiffs in actions against the bankrupt's debtors. It

*Tenon v.*  
*Mars*,  
8 B. & C. 638.

\* This is a most remarkable recognition of that comity which inspired Lord Blackburn's powerful diatribe, by the same judge on whose enunciation of the doctrine of obligation (said to be antagonistic to it) the judgments in *Godard v. Gray* and *Schibbsby v. Westenholz* were entirely founded.

*Godard v.*  
*Gray*,  
L. R. 6 Q.  
B. 139.  
*Schibbsby v.*  
*Westenholz*  
ib: 155.

Chapter I. would be impossible to assert that the English courts, in virtue of their having recognised this right of action peculiar to French Bankruptcy Law, should allow two out of, say, three co-trustees of an English bankrupt to sue a French debtor to the estate. To expect the French courts to recognise the judgment in such an action would be thoroughly illogical; this would involve a recognition of *lex for lex*: not to expect it would be an admission against the wisdom and justice of the decision. But, assuming a special authorisation (under section 84 (1) of the Bankruptcy Act, 1883) to any two out of several co-trustees to bring actions in their own names against debtors to the estate; then, that power being exercised against a Frenchman, and judgment given against him, it would be a legitimate expectation that that judgment should be recognised and enforced by the French courts, when circumstances render it necessary: this would involve only a reciprocal recognition of rights corresponding in their nature, in other words, a recognition of the principle *jus for jus*.

Again, consider the right of an assignee of a chose in action to sue upon it. In England this right is governed by section 25 (6) of the Judicature Act, 1873. For the sake of argument, let us assume 'express notice in writing to the debtor' not to be required by French law, but only verbal notice. The English law of course governs Frenchmen within the jurisdiction, and therefore such a Frenchman being assignee of a chose in action against an Englishman, would not succeed against him if the assignor had not fulfilled the requirements of the law. Let the position now be reversed: an Englishman assignee in France of a chose in action against a Frenchman, of which assignment the assignor has given the debtor the essential verbal notice. If the French courts, adopting the *lex talionis*, were to decide that under the circumstances they would require 'notice in writing' to be given after the manner required by English law, comity would not require such a judgment to be enforced by an English court: that would be *lex for lex*. But suppose in these two examples judgment to have been given in England and France in accordance with the law in either case applicable: then, comity would require a French court to respect the English judgment, and an English court to respect the French judgment, when the necessity should arise: this would be *jus for jus*. The laws of each country being made according to the wisdom of its legislature, neither could France expect English law to be relaxed in favour of Frenchmen in English jurisdiction, nor should her courts extend the pro-

So as to  
assignee of  
chose in  
action.

visions of French law as against Englishmen in French juris- **Chapter I.**  
diction.

So as to  
rights under  
company  
law.

A small group of cases in which the principle has also been recognised remain to be considered.

*Bank of Australasia v. Harding*.<sup>1</sup>

*Bank of Australasia v. Nias*.<sup>2</sup>

*Kelsall v. Marshall*.<sup>3</sup>

<sup>1</sup> 19 L. J.  
C. P. 345.  
<sup>2</sup> 20 L. J.  
Q. B. 284.  
<sup>3</sup> 1 C. B.  
N. S. 266.

A colonial legislature had passed an act enabling the chairman of a company to sue and be sued on behalf of the company, and provided that execution upon the judgment against the chairman in such an action might be issued against the goods and lands of any member of the company, in like manner as if such judgment had been obtained against him personally. Judgment in the Colonial court was given against the chairman, and this judgment was enforced in England against a shareholder. Lord Campbell, C.J., said:—‘The Colonial legislature clearly had authority to ‘pass an act regulating the procedure by which the contracts of ‘the bank should be enforced in the courts of the colony. The ‘act imposes no new liability upon him, but only regulates the ‘mode in which that liability shall be judicially constituted.’ And there is no hardship in requiring a person, residing in England but a member of a company carrying on business in a foreign country, to know the law of that country applicable to his position.

This is an instance of the recognition of a right assumed by a foreign state legitimately including in its scope certain English subjects: *mutatis mutandis*, we should expect foreign courts to recognise a corresponding right assumed by English law, also including legitimately in its scope certain foreign subjects; though we could not expect a recognition of an identical right assumed not in accordance with an English statute, but because of the existence of the foreign statute.

## II.

Examination as to true cause of action in action on foreign judgment. THE CAUSE OF ACTION:—

It has already been pointed out that many of the difficulties surrounding the subject may be traced to the English system of treating the foreign judgment as an ordinary cause of action: and there can be no doubt that if the procedure for bringing the judgment before English courts were, as in some foreign countries, a simple motion to enforce the judgment, the view which Judges in this country have taken of the question would be considerably simplified; the change would also be attended by an enormous



Chapter I. advantage to the suitor, and a corresponding benefit to the commercial relations between England and foreign states.

On the very threshold of the inquiry we are startled by the appearance of two doctrines, now put forward jointly, now separately: at times with so much weight attributed to them as to summarily dispose of the whole question in dispute, at other times passed over in almost contemptuous silence. These are the doctrines of '*primâ facie* evidence' and 'non-merger.'

Two old doctrines discussed.

It will tend to simplify the discussion, if we endeavour to keep the following divisions distinct:—

- i. The doctrine of *primâ facie* evidence.
- ii. The doctrine of non-merger.
- iii. Actions on the original cause of action:

the third division being a consequence of the first two. Owing however to the conglomerate form into which they have unfortunately fallen in their exposition, it is quite impossible thoroughly to disentangle the delicate threads of argument, and we must therefore be content to gather them in part separately, and in part collectively.

Now, after an attentive perusal of the cases, it becomes evident that these doctrines, though advanced with much confidence, were never thoroughly analysed, and their consequences not fully foreseen. The study of them somewhat resembles the study of a puzzle; and the growth of this puzzle in the minds of the old lawyers, as nearly as we can trace it, must have been somewhat as follows:—

An action brought on a foreign judgment is of course an action brought to recover the judgment debt: that being so, the action must be in form at least an ordinary action for debt, of which debt the judgment must necessarily be evidence: is it to be conclusive evidence, or only *primâ facie* evidence?

The confusion from which the doctrines have sprung.

But the judgment debt is the same in amount as the original debt to recover which the action was brought in the foreign country. Hence some confusion in the statement, most difficult to unravel, as to which debt the judgment was to be considered evidence of. But the two debts being identical, the loose phraseology never came to be corrected; and the doctrine that 'the foreign judgment is evidence (*primâ facie*, it was afterwards determined) of the debt' was adopted in all its vague simplicity; it was thus alluded to in a very recent case, *Grant v. Easton*, by Grove, J.:—  
'It has long been settled law that a foreign judgment is *primâ facie* evidence of a debt.' But as it was an action on a debt, on

*Grant v. Easton*,  
49 L. T., 645.

which of two debts equal in amount not being exactly expressed, Chapter I.  
 an action on the original cause of action soon came to be confused with an action on the judgment debt: Therefore it became necessary to declare that the original cause of action was not merged in the foreign judgment pronounced upon it: and then, as a natural consequence, it was held that the plaintiff must have the option of suing either on the judgment or the original cause of action. If he adopted the former alternative, the judgment would be evidence of the judgment debt; if the latter, the judgment and any other evidence would support the case on the original debt. 'To whatever country a debtor flies, justice requires the courts of that country to compel him, if he can, to pay his debts. It will often be impossible to prove debts in a foreign state by the testimony of witnesses. The only way in which they can be established is by the judgments of the courts of that country in which the parties and their witnesses resided when such debts were contracted.' (Best, C.J., *Arnott v. Redfern*.)

*Arnott v. Redfern.*  
 3 Bing: 353.

This continuous and contiguous expansion of the three principles seems to bring all the fallacies contained in them to the surface; and we might almost have hoped to have passed them by, or at least to have given them scant notice, but the errors are deeper rooted than at first appears, and, in one form or another, often crop up in the present day. The cases must therefore be reviewed and analysed.

### i.

#### *The doctrine of primâ facie evidence.*

The doctrine of *primâ facie* evidence.

In *Houlditch v. Marquess of Donegall*, proceedings had been taken in the Court of Chancery in Ireland to obtain the full benefit of a decree of the Court of Chancery in England; the House of Lords reversed the decision of the Court below in which the contrary doctrine had been maintained: and Lord Brougham, C., said:—'The language of the opinions on one side has been so strong, that we are not warranted in calling it merely the inclination of our lawyers: it is their decision that in this country a foreign judgment is only *primâ facie*, not conclusive evidence of a debt (a ground of action).'

*Houlditch v. Donegall.*  
 2 Cl. & Fin: 470.

Cases supporting it.

The doctrine was also recognised in *Walker v. Witter* following *Sinclair v. Fraser*; in *Robertson v. Struth*; in *Hall v. Obder*: Le Blanc, J., declaring that 'it was long ago determined that a judgment in a foreign court had only the force of a simple contract between the parties': and finally in the *Bank of Australasia*

*Walker v. Witter.*  
 1 Dougl. 1.  
*Sinclair v. Fraser.*  
 1 Dougl: 5.  
*Robertson v. Struth.*  
 5 Q. B. 941.  
*Hall v. Obder.*  
 11 East 118.

Chapter I. *v. Harding*, in which it was distinctly stated that a foreign judgment had always been treated as *primâ facie* evidence of the cause of action.

*Bank of Australasia v. Harding.*  
19 L. J.  
C. P. 945.

These are the chief cases in which the doctrine has been enunciated: and from the way in which it is put the germs of the confusion as to which debt the judgment is evidence of become very noticeable.

*Godard v. Gray.*  
L. R. 6  
Q. B. 139.

The doctrine however met with complete demolition at the hands of Blackburn, J., in *Godard v. Gray*.—‘There is no case decided on such a principle, and the opinions on the other side of the question are at least as strong as those to which Lord Brougham refers. Indeed it is difficult to understand how the common course of pleading is consistent with any notion that the judgment is only evidence. If the judgment were merely considered as evidence of the original cause of action, it must be open to meet it by any counter-evidence negating the existence of that original cause of action.’

Disapproved by  
*Blackburn, J.*

*Houlditch v. Donegall.*  
2 Cl. & Fin.: 470.

It must in fairness however be noticed that *Houlditch v. Marquess of Donegall* was in fact decided on this principle; and also that no other judge has in terms expressed his disapproval of it, although many have completely ignored it. But if the legitimate consequences of a decision, even of the House of Lords, be uniformly for many years disregarded, we are entitled to assume that the decision has ceased to be binding on the Courts. The dictum of Blackburn, J., hits accurately the blot in the doctrine: *Primâ facie* evidence is such evidence as, only if it be contradicted, will of itself establish the case it is put forward to support: and therefore it follows at once that rebutting evidence may be brought on the other side. If it be *primâ facie* evidence of the judgment debt, as some judges have considered it, the judgment itself may be attacked, and no limitation can be imposed on the defences raised: If it be *primâ facie* evidence of the original cause of action, as others have declared it to be, defences may be raised to that cause of action. Thus in either case, the dispute will be tried on its merits a second time, and the foreign decision upon it in effect be ignored by the English courts.

Meaning of  
*primâ facie*  
evidence.

Result of  
the doctrine.

No proposition more infected with insular prejudices could well have been formulated: no more contemptuous method of disregarding the justice of foreign courts could well have been devised. The doctrine too was quite indiscriminate in its application: an English Judge at Nisi Prius was held to be justified in ignoring a decision of the highest appellate tribunal of a foreign state.

But it may be said, the foreign judgment must be evidence of something. This must be the case so long as the English courts are fettered by procedure necessitating an action being brought upon the judgment. But such difficulty as this question of evidence creates would at once vanish were the simpler procedure of a motion to enforce the judgment adopted.

The doctrine  
the result of  
English  
procedure.

We have said more than once, that to our existing procedure may be attributed all the difficulties attending the subject, and this doctrine points very distinctly to the reason. Our courts till recent years were encumbered with technicalities, and the right to bring an action was not exempt from them. The form of the action was of the essence of the suit; and the declaration in an action on a foreign judgment resolved itself of necessity into a count of debt, to be met with the general issue of never indebted. Even now the judicial mind can hardly emancipate itself; the mere mention of the word 'obligation' has, in the author's experience, drawn from the Bench the assertion that a foreign judgment must be a debt because an action of debt used to be brought upon it.

What the  
foreign  
judgment is  
evidence of.

To revert to the question of evidence. Amplifying the doctrine of obligation he was advocating in *Godard v. Gray*, Blackburn, J., continued:—The judgment in itself gives rise, at least *prima facie*, to an obligation to obey that judgment and pay the sum 'adjudged.'—But following out the doctrine of Obligation and Comity which has been advanced, it becomes at once clear that the judgment, by means of the formal record of it, is the evidence of the existence of the foreign obligation and sanction which (as has been pointed out, p. 18) it is essential to bring before the English court: or more accurately, it is the evidence which is requisite to establish to the satisfaction of the English court the existence of the *bare obligation* which was conceived as having arisen in this country. Its existence must of course be proved, before it can be clothed with the International auxiliary sanction resident in the English Sovereign Authority.

*Godard v. Gray.*  
L. R. 6  
Q. B. 139.

*Bigelow.*

Mr Bigelow has thus graphically described the variations that this doctrine has undergone (Law of Estoppel: Boston, 1872—p. 185):—

'The courts for many years fluctuated in their rulings concerning the effect 'to be given to the judgments of tribunals of foreign countries, at one time considering them as *prima facie* evidence only, and liable to be overturned by 'countervailing proof; now advancing and holding them conclusive of the 'matters adjudicated, and again receding to the former position; until finally, 'when the precise point presented itself for earnest consideration, they declared 'in favour of the conclusiveness of these judgments, on solemn deliberation. 'It was finally settled in England considerably earlier than in America; and 'some of our courts still refuse to make the advance.'

## Chapter I.

## ii.

*The doctrine of non-merger.*

This second doctrine appears to be supported by a greater weight of authority than the former, although as we have seen, it flows from the same error. The doctrine of non-merger.

The law is stated in the following terms by no less an authority than the learned author of Smith's Leading Cases in his able note to the Duchess of Kingston's case:—'Foreign judgments certainly do not occasion a merger of the original ground of action.' The cases given in support being

*Smith v. Nicolls.*<sup>1</sup>

*Hall v. Obder.*<sup>2</sup>

*Bank of Australasia v. Harding.*<sup>3</sup>

*Bank of Australasia v. Nias.*<sup>4</sup>

*Kelsall v. Marshall.*<sup>5</sup>

*Castrique v. Behrens.*<sup>6</sup>

which have been followed in *Fergus v. Wardlaw* [New Brunswick].

Story would seem to draw the same principle from the cases [Conflict of Laws, §§ 599 a. b.]. Story, §§ 599 a. b.

Westlake also supports the doctrine:—'The maxim *transit in rem judicatam* does not in England apply to foreign judgments' [International Law, 1st ed : § 392. 2nd ed : § 313]. Westlake.

We will now examine these cases attentively.

In *Smith v. Nicolls* the defendant pleaded to an action of trover, that he being in the jurisdiction of the Vice-Admiralty Court of Sierra Leone, the Plaintiff had recovered a judgment against him in that court for the same cause, and damages had been awarded. This plea was held ill. Satisfaction of the judgment however was not pleaded; the sum awarded had in fact not been paid. The plaintiff replied that the judgment which he himself had obtained was irregular, raising the usual stereotyped objections to it: that the defendant had not been properly served, had not appeared, etc.; and Tindal, C.J., declared that he was not bound by his Sierra Leone judgment. After stating as the ground on which a judgment recovered in an English Court bars the plaintiff from any further action, to be, that the original nature of the debt or damage is changed, and that there comes into existence a higher remedy, the power to issue immediate execution; the learned Judge continued:—'This Vice-Admiralty Court in a Colony is not a Court of Record. If the judgment has not altered the nature of the rights between the parties, why

*Duchess of Kingston's case.*

2 Sm :

L. C. [8th

ed.] 839.

<sup>1</sup> 8 L. J. :

C. P. 92.

<sup>2</sup> 11 East

118.

<sup>3</sup> 19 L. J. :

C. P. 345.

<sup>4</sup> 20 L. J. :

Q. B. 284.

<sup>5</sup> 1 C. B. :

N. S. 241.

<sup>6</sup> 30 L. J. :

Q. B. 163.

*Fergus v.*

*Wardlaw.*

3 Kerr 665.

*Smith v.*

*Nicolls.*

8 L. J. : C. P.

92.

Examination of authorities said to support it.



'is the plaintiff to be deprived of the right which every subject Chapter I.  
'has to sue in the courts of this country for the debt or damage.  
'The original ground of action is not extinguished and merged  
'between the parties: no execution could be issued on the judg-  
'ment; but it is to be treated merely as the ground of a new  
'action. When it becomes necessary to enforce foreign judgments  
'in this country, the plaintiff has his option either to resort to  
'the original ground of action, or [sue] on the judgment re-  
'covered.'

[Query] Vaughan, J. :—'In order to bar an action here, the judgment  
'in the Colonial court must be final and conclusive between the  
'parties: which *Hall v. Obder* and *Plummer v. Woodburne* shew  
'clearly it is not.'

*Hall v.*  
*Obder*,  
11 East, 118.  
*Plummer v.*  
*Woodburne*,  
4 B. & C.  
625.

Bosanquet, J. :—'The foreign judgment amounts only to an  
'agreement between the parties by which they consent that the  
'damages for the tort shall be assessed at a certain sum. It can-  
'not surely be contended that an agreement as to the amount of  
'certain damages which have not been paid is a bar to the action.  
*Hall v. Obder* :—'Foreign Judgments strictly speaking are not to  
'be considered on the same footing as judgments in our own  
'Courts of Record; they are but evidence of the debt, and do  
'not bar or stay an action on simple contract. But assumpsit  
'lies upon them, and it is open to the parties to question their  
'regularity.' (Lord Ellenborough, C.J.)

*Bank of Australasia v. Harding* :—During the argument Wilde,  
C.J., expressed a doubt whether it followed 'that when the  
'original cause of action is merged, that must be treated as con-  
'clusive everywhere,' and in his judgment he said :—'This judg-  
'ment is pleaded by way of merger or extinguishment of the  
'cause of action. Now, if a court of competent jurisdiction has  
'given judgment, that judgment at the place where it was given is  
'conclusive against the parties, if not appealed against. At that  
'place it must be taken as a merger or extinguishment. But in  
'all the cases on the effect of a foreign judgment, it has been  
'treated only as *primâ facie* evidence of the cause of action.—The  
'judgment may be a merger in the Colony, because it is con-  
'clusive there: but when sued on in another country, it is only  
'*primâ facie* evidence of the debt.'—and

*Bank of*  
*Australasia*  
*v. Harding*,  
19 L. J.  
C. P. 345.

Creswell, J. :—'There is nothing to prove that the original  
'contract is extinguished or merged, or any higher remedy given,  
'or that the right of action is taken away.'

Talfourd, J., also concurred; but Maule, J., doubted.

Chapter I. *Bank of Australasia v. Nias* :—

*Bank of  
Australasia  
v. Nias.*  
20 L. J.  
Q. B. 284.  
*Kelsall v.  
Marshall.*  
1 C. B.  
N. S. 266.

The judgment of Lord Campbell, C.J., most certainly does not support the proposition.

*Kelsall v. Marshall* :—Cresswell and Crowder, JJ., simply followed the two preceding cases on the very important principle noticed on p. 22, and which has no connexion with the present doctrine.

*Castrique v.  
Behrens.*  
30 L. J.  
Q. B. 163.

*Castrique v. Behrens* :—

If this case has any application at all to the doctrine, it is directly at variance with it.

*Fergus v.  
Wardlaw.*  
3 Kerr 665.

*Fergus v. Wardlaw* ; [New Brunswick] :—

This case simply adopts what the Colonial Judges conceived to be the accepted doctrine in England.

Can it be urged seriously that the result of these cases is the doctrine expounded in Smith's Leading Cases? The last four may be left out of our consideration. *Smith v. Nicolls* is a most extraordinary case, the salient feature in which we shall have occasion to dwell upon hereafter : the real ground of the decision seems to have been that the judgment was of a Colonial Vice-Admiralty Court, *a court of inferior jurisdiction*, and therefore not entitled to respect. Tindal, C.J., however most forcibly intimated his belief in the existence of the doctrine : Vaughan, J., declaring it to be founded on *Hall v. Obder*.

Summary of  
authorities.

*Smith v.  
Nicolls.*  
8 L. J.  
C. P. 92.

The cases are thus reduced to two, *Hall v. Obder* and the *Bank of Australasia v. Harding*. The very first thing we come across in them is another principle tinged with the technicalities of our old judicial system : Foreign Courts are not Courts of Record ; in other words, are not of equal dignity with our own Courts of Record. But the term Court of Record has no other signification but that the acts and judicial proceedings of the court are enrolled 'for a perpetual memorial and testimony.' Really it is synonymous with Court of Law. We may well assume that the Courts of Law in foreign states also have an enrolment of their acts and judicial proceedings for a perpetual memorial and testimony, and indeed in *Houlditch v. Marquess of Donegall* Lord Brougham expressly made use of the phrase 'foreign Court of Record.'

[But cf:  
chapter vii.]

*Hall v.  
Obder.*  
11 East 118.  
*Bank of  
Australasia  
v. Harding.*  
19 L. J.  
C. P. 345.

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Courts of  
record.

*Houlditch v.  
Donegall.*  
2 Cl. & Fin.  
470.

The assertion that foreign courts are not of equal dignity with English courts is another form of that insular doctrine to the vice of which, disfiguring so many decisions, we have had already to draw attention, and which found so forcible an advocate in Lord Brougham in the case above referred to :—'One argument is clear

‘that the difference between our courts and their courts is so great, that it would be a strong thing to hold that our courts should give a conclusive force to foreign judgments when, for aught we know, not one of the circumstances that we call necessary may have taken place in procuring the judgment.’

Doctrine of non-merger a repetition of doctrine of *prima facie* evidence.

The second principle to be found in these two cases is the one on which the doctrine mainly rests. It is a repetition of the doctrine of *prima facie* evidence: and thus this second doctrine, although sometimes advanced independently, reverts to the former one:—‘The judgment may be a merger in the foreign country, because it is conclusive there. But when sued on in another country, it is only *prima facie* evidence of the debt.’—That doctrine however, as we have seen, was completely demolished by Blackburn, J., whilst this not only has remained untouched, but is even now endowed with fresh vitality. That it does however hang on to the former one is incontrovertible, and the inevitable conclusion is that to the fall of the one must also supervene the complete extinguishment of the other.

The debt extinguished abroad supposed not to be extinguished here.

The most remarkable argument of all is that a debt, confessedly extinguished by the judgment in the country where that judgment was pronounced, is said to be not extinguished in another country. —Although in no way connected with the principle of comity, it must be remarked that the judges who have supported these two doctrines of *prima facie* evidence and non-merger, are also authorities supporting that principle: the result of that vagueness which was said to be its radical error.

There remains therefore only this to be added, that both the principle of ‘The Enforcing’ already considered, and of ‘The Recognising’ shortly to be taken in order, are entirely at variance with what may now be called the old doctrine of ‘non-merger.’

### iii.

#### *Actions on the original cause of action.*

Actions on the original cause of action.

‘When it becomes necessary to enforce foreign judgments in this country, the plaintiff has his option either to resort to the original ground of action or sue on the judgment recovered.’ [Smith’s Leading Cases, 8th ed: p. 839., citing Tindal, C.J., in *Smith v. Nicolls.*]

*Smith v. Nicolls.*  
8 L. J.:  
C. P. 92.

*Westlake.*

‘The plaintiff may sue in England on the original cause as well as on the judgment, until the latter is satisfied, and it is common in the cases before the Judicature Acts to find counts



Chapter I. 'on each in the same declaration.' [Westlake.—International Law, 2nd ed: § 313.]

This alleged right of course depends on the same authorities which have been put forward in support of the doctrine of non-merger, and is the last link in this chain of puzzles. It is the practical consequence of that doctrine, and is frequently adopted in the present day without even calling forth a remark from the Bench. Occasionally, as we have already noticed, the judgment itself has been considered as part of the evidence to support the action on the original cause of action; but if the plaintiff sues alternately on both, then not only is formal evidence in support of the judgment adduced, but also the evidence already used at the foreign trial in support of the original cause of action; the result being that evidence in respect of the two causes of action goes indiscriminately to the jury.

The right, if it exist, depends on the two former doctrines.

The result is that the whole evidence goes before the jury.

*Stein v. Cope.*  
[not reported.]

Only so recently as March, 1883, an instance of this occurred in the case of *Stein v. Cope*, tried at the Guildhall before Denman, J. The action was on a judgment of the Tribunal de Commerce at Antwerp, from which the defendant had unsuccessfully appealed: there was an alternative claim in respect of the original contract. It transpired that in addition to the usual proceedings before trial, there had been the great delay and expense of a Commission to Antwerp. At the trial, the claim on the original cause of action was taken first in order, and as a necessary consequence the whole of the evidence on the merits of the case went to the jury. The verdict was for the plaintiff on the judgment and on the original cause of action.

With regard to the extra expense attending such proceedings, it may be urged that the defendant himself brings this state of things about by raising all manner of defences to the judgment already given against him: but this is merely the consequence of the laxity of the rules supposed at present to be English law.

If we consider this question apart from the doctrines of *prima facie* evidence and non-merger, it seems radically opposed to the whole principle on which foreign judgments are enforced. One of the evils arising from it is a very practical one. Whichever main doctrine the Court acts upon, at least this rough principle is always admitted, that the case will not be heard again on the merits: yet, the whole evidence in the case is laid before the jury in respect of the original cause of action; and is supposed to be withheld from them in respect of the foreign judgment. Is it conceivable that the necessary discrimination will be found in

Yet the case should not be heard on its merits.

twelve laymen drawn hap-hazard to perform the functions of Chapter I. jurymen? It is also opposed to the maxim *interest reipublicæ ut sit finis litium*, which, as we shall shortly see, includes in its application actions on foreign as well as on domestic judgments: and was directly applied to them by Wilde, C.J., in *Ellis v. McHenry*:—*Ne lites immortales essent dum litigantes mortales sunt*. But if on the other hand it is to be taken as an integral part of the doctrines just considered, then it must stand or fall with them, and the fallacies contained in them have, we venture to think, been sufficiently pointed out. The difficulties attending their reception seem to have struck the learned author of Smith's Leading Cases; otherwise it is difficult to account for the following paragraph:—'It may possibly be, that, if the plaintiff should adopt the former part of the alternative and sue on the original ground of action, it would be open to the defendant to controvert that ground of action notwithstanding the production of the foreign judgment, on the same principle on which it is held that where there is an opportunity of placing the judgment of one of our own superior courts on the record, and it is not placed there, it will not be conclusive.' [8th ed: p. 839.]

*Ellis v. McHenry.*  
L. R. 6  
C. P. 228.

Doubts have arisen in the minds of authors who support the theory.

The doubt in Story's mind is most forcibly illustrated by the two following passages from the 'Conflict of Laws:':—'The present well-established doctrine in England is, that a foreign judgment in favour of the plaintiff is not a bar to a suit in England upon the original cause of action': [§ 599a.] 'It may now be regarded as fully established in England, that the contract resulting from a foreign judgment is equally conclusive in its force and operation with that implied in any domestic judgment.' [§ 618h.] The footnote to the former paragraph however, seems to throw some doubt upon the proposition therein enunciated.

*Story.*  
§ 599a.

§ 618h.

It may perhaps be thought that the consideration of these principles has been carried to an undue length: but the space devoted to them will not have been wasted if it lead to their final extinction, and the consequent saving to suitors, even under the existing procedure, of much time and expense.

### III.

#### THE RECOGNISING:—

We must now consider the effect of a foreign judgment from the second point of view, that of the defendant who has been

**Chapter I.** successful in the foreign suit, and who is harassed by a second action for the same cause.

‘But it is otherwise, it is said,’ says Story, ‘where the defendant ‘sets up a foreign judgment as a bar to proceedings; for if it ‘has been pronounced by a competent tribunal, and carried into ‘effect, the losing party has no right to institute a suit elsewhere, ‘and thus bring the matter again into controversy; and the other ‘party is not to lose the protection which the foreign judgment ‘gave him. It is then *res judicata*, which ought to be received ‘as conclusive evidence of right; and the *exceptio rei judicate*, ‘under such circumstances, is entitled to universal conclusiveness ‘and respect. This distinction has been very frequently recog- ‘nised as having a just foundation in international justice.’ [Conflict of Laws, § 598.]

The Recog-  
nising :  
Story,  
§ 598.

*Reimers v.  
Druce.*  
26 L. J :  
Ch : 196.

We have here a development of the broad distinction hinted at by Romilly, M.R., in *Reimers v. Druce*. A different rule of: p. 2. with regard to the effect of a foreign judgment has been traced by Story in the cases bearing on this branch of the subject. We are now familiar with the differences of opinion expressed by judges as to the nature of the recognition to be accorded to the judgment when an action is brought upon it; but here, when it is brought forward as a defence we find the rule declared in unmistakable terms to be that of ‘entire faith and credit’ :—‘It ‘is then *res judicata* which ought to be received as conclusive ‘evidence of right.’

This distinction, if it exist, must now be carefully examined.

Pausing for a moment, let us sketch a brief outline of the plea *res judicata* as it is accepted in our courts, with reference to English adjudications of the matter. The decision of Knight-Bruce, V.-C., in *Barrs v. Jackson* was overruled in the House of Lords as to the application of the law: but it has been uni-  
*Res Judicata with reference to an English decision. Knight-Bruce, V.-C.* versally admitted that no more luminous exposition of that law is to be found in the Reports: we may therefore follow the Vice-Chancellor’s judgment :—‘With the rule of Civil Law rightly ‘understood, which in the language of Ulpian, says,—*res judicata* ‘*pro veritate accipitur*,—the law of England generally agrees.’

*Barrs v.  
Jackson.*  
1 Y. & C :  
Ch : 585.  
(on app.)  
1 Phil : 582.

The sound reason of this rule cannot be better expressed than it is by Paulus in the Digest [Book 44, Title 2, Section 6] thus, ‘Singulis controversiis singulas actiones, unamque judicata finem ‘sufficere, probabili ratione placuit; ne aliter modus litium multipli- ‘catus summam atque inexplicabilem faciat difficultatem: maxime ‘si diversa pronunciarentur.’

*Vinnius*,  
definition.

Vinnius, in a note upon the words 'per exceptionem rei judi- **Chapter 1.**  
'catæ' in the Institutes, [Book 4, Title 13.] says :—'Quæ ita agenti  
'obstat si eadem quæstio inter eosdem revocetur, id est, si omnia  
'sint eadem, idem corpus, eadem quantitas, idem jus, eadem causa  
'petendi, eadem conditio personarum.'

Lord Holt in *Blackham's case* thus enunciated the law :—'A *Blackham's*  
'matter which has been directly determined by sentence cannot *case*,  
'be gainsaid; it is conclusive in such cases, and no evidence *1 Salk : 291.*  
'shall be admitted to prove the contrary. But that is to be  
'intended only in the point directly tried; otherwise it is, if a  
'collateral matter be collected or inferred from their sentence.'

'Generally, the judgment neither of a concurrent nor of an  
'exclusive jurisdiction, is (whether receivable or not receivable),  
'conclusive evidence of any matter which came collaterally in  
'question before it, though within the jurisdiction, or of any  
'matter incidentally cognisable, or of any matter to be inferred by  
'argument from the judgment: and a judgment is final only for  
'its proper purpose and object.'

'An allegation on record, upon which issue has been once taken  
'and found, is, between the parties taking it, conclusive according to  
'the finding thereof, so as to estop them respectively from litigating  
'that fact once so tried and found.'

'But it is to be collected that the rule against re-agitating  
'matter adjudicated, is subject generally to this restriction—that  
'however essential the establishment of particular facts may be  
'to the soundness of a judicial decision, however it may proceed  
'on them as established; and however binding and conclusive  
'the decision may, as to its immediate and direct object, be, those  
'facts are not all necessarily established conclusively between the  
'parties, and that either may again litigate them for any purpose as  
'to which they may come in question, provided the immediate  
'subject of the decision be not attempted to be withdrawn from  
'its operation, so as to defeat its direct object. This limitation  
'to the rule, appears to me, generally speaking, to be consistent  
'with reason and convenience, and not opposed to authority. I am  
'not now referring to the law applicable to certain prize and  
'admiralty questions, which are governed by principles in some  
'respects peculiar.'

'The adjudication in the former action must be inconsistent  
'with the notion of the liability in the present one.' (Channell, B.,  
*Phillips v. Ward.*)

'To constitute a former recovery a bar, it must be shewn that

*Phillips v.*  
*Ward.*  
*33 L. J.*  
*Ex : 7.*

**Chapter I.** 'the plaintiff had an opportunity of recovering, and but for his own fault might have recovered, in the former suit that which he seeks to recover in the second action.' (Willes, J., *Nelson v. Couch*.)

*Nelson v. Couch.*  
15 C. B.  
N. S. 99.

It does not appear necessary that the judgment should have been satisfied: only that it is final.

As to the identity of the two suits we may cite the following passage from 'Modern Roman Law,' p. 94, by Professors Tomkins and Jencken—'In respect to the requisites for the identity of a legal contention, two things are needed:

Professors  
Tomkins  
and Jencken.

'i. The *exceptio rei judicate* falls to the ground, when no identity exists, even though the subsequent action may resemble the former one.

'ii. The *exceptio* is maintainable, when the identity is actually present, though the previous point in litigation and the new one may be somewhat dissimilar. In personal actions, identity of right results from similarity of origin; but in real rights and in real actions, the mode of origin is immaterial.'

On a plea of judgment recovered for the same cause of action, the matter of record is the only thing which can be directly put in issue—that is, a replication of Nul Tiel Record is allowed. If the judgment had been recovered for another cause, there must have been a 'new assignment.' A replication was sometimes pleaded in the form of a traverse, that the judgment was not in respect of the same causes of action as in the declaration mentioned: (e.g., *Lord Bagot v. Williams*), but substantially this was a 'new assignment.' (*Bullen and Leake's Precedents of Pleadings*.)

*Bagot v. Williams.*  
3 B. & C.  
235.

By Order XIX., rule 14 of the Judicature Act rules of 1875 the 'new assignment' was replaced by an amendment in the statement of claim. [Order XXIII. rule 6, R. S. C. 1883.]

*New Practice.*  
O. xxiii. r. 6.

It must be borne in mind that although *res judicata* is usually treated as the defence to an action on a cause of action already adjudicated upon, yet the principle involved in it is equally applicable where an action is brought upon the adjudication: that is to say, the question in dispute is treated as already decided.

The full  
meaning of  
*res judicata*.

But an action on a home judgment, execution being the appropriate remedy to enforce obedience to it, is of rare occurrence; and being superfluous is not regarded with any favour by the law; therefore it is that, with regard to English decisions, the doctrine of *res judicata* has come to be considered as solely appertaining to the case of the defendant. But with regard to foreign decisions, action being brought upon them as well as defences raised in respect of them, it is obvious that whatever

Difference in  
its applica-  
tion to home  
and foreign  
judgments.



principle is applicable to them, whether it be *res judicata* absolutely Chapter I. or in some modified form; that principle should govern their reception equally in both cases. This seems to have been lost sight of in the cases in which the point has been discussed.

Anticipating the result of the discussion we may state that although it has been customary to recognise and in fact to act upon this distinction, yet (with one solitary exception) there appears to be no solid foundation for it. Its existence simply cumbered this branch of the enquiry.

The consideration involved.

There are two considerations involved:—

(a). THE RATIONALE of the defence.

(b). THE EXTENT of its application.

Taking these separately, we propose to consider first, their bearing on English judgments, and then how each of them applies to the recognition of foreign judgments by English courts.

First consideration. The rationale.

(a). THE RATIONALE OF 'RES JUDICATA.'

When the plaintiff brings an action upon a judgment, the defendant is only allowed to plead satisfaction, or release; or *Nul tiel Record*: in other words he is allowed only to put in issue the fact of there being, or of there ever having been, such record in existence. But he is not allowed to put the judgment itself in issue, that is to re-open the case on which it has been given. So also the plaintiff, when the defendant brings the judgment into court pleading it in bar to the action, is allowed only to put in issue the fact of there being such a record; neither may he re-open the case on which it has been given.—'A record thus 'importing credit and verity, shall be tried only by itself'—that is, by production and inspection; 'the reason being, that there may thus be an end of controversy.' The defence to the judgment whether raised by plaintiff or defendant, must therefore be, that there is no such record; and not, that there is no obligation to obey the judgment.

Broom's Common Law, p. 262, n.

The full effect then of the defence *res judicata*, the adjudication being that of an English court is, that it is absolute; the record existing as the defendant states.

Is this rule to be extended to foreign judgments? Authorities in favour of it being extended.

Is the same absolute effect to be extended to a foreign adjudication on the subject-matter of the action?

The leading authorities in favour of this extension which, as we have seen, is upheld by Story, are:—The decision of the House of Lords in *Ricardo v. Garcias*:—Judgment had been

*Ricardo v. Garcias*, 12 Cl. & Fin. 368.

**Chapter I.** given by competent tribunals in France against Garcia in an action brought by him against certain persons. He then filed a bill in Chancery against some of the same persons and for the same purposes; charging that the proceedings and judgment of the French court were contrary to justice, and were not final and conclusive: The plea of judgment abroad, set forth in substance and effect, was over-ruled by the Vice-Chancellor: The House of Lords [Lord Lyndhurst, C., Lord Brougham, Lord Campbell, C.J.] reversed this decision: and Lord Campbell said:—‘A foreign judgment may be pleaded as *res judicata*; because the foreign tribunal has clearly jurisdiction over the matter, and both parties being before the tribunal which adjudged between them, that is a bar to a subsequent suit in this country for the same cause.’

*Phillips v. Hunter.*  
2 H. Bl: 402.

Eyre, C.J., dissenting, in *Phillips v. Hunter*:—‘It is in one way *Eyre, C. J.* only that the sentence or judgment of a foreign court is examinable here; that is, when the party who claims the benefit of it applies to our courts to enforce it, and thus voluntarily submits it to our jurisdiction. In all other cases, we give entire faith and credit to the sentences of foreign courts, and consider them as conclusive upon us.’

*Cammell v. Sewell.*  
27 L. J:  
Ex: 447.

Martin, B., in *Cammell v. Sewell*, delivering the judgment of the Court: [Pollock, C.B., Martin, Channell, BB.]. The difficulty in the case was whether the decision as to the validity of a sale of cargo by the Norwegian Superior Diocesan Court at Drontheim, was in the nature of a judgment *in rem*. The conclusion of the judgment was as follows:—‘But, assuming that the judgment is *Martin, B.* not one in the nature of a judgment *in rem*, it seems nevertheless, that it must be taken as conclusive, and that the judgment must be taken to be the judgment of a court of competent jurisdiction. That judgment has been given against the plaintiffs, and we think they are conclusively bound by it: *interest reipublicæ ut sit finis litium.*’

*Hamilton v. Dutch East India Co.:*  
8 Bro: P.  
C. 264.

*Hamilton v. Dutch East India Co.*; in which case the following argument was accepted by the House of Lords:—‘For that the cause had been judged and determined by the courts of Malacca and Batavia, their sentences could not be reviewed by the Court of Admiralty in Scotland which has no jurisdiction over these courts, and that this plea or exception (of *res judicata*) is, by the law of nations, available in all courts, it being an established maxim *quod res judicata pro veritate habetur*. And though, when a decree pronounced in one country is sought to be carried into

Argument in  
*Hamilton's*  
case  
approved by  
House of  
Lords.

‘execution in another, the judge whose interposition is demanded ought not to afford it, without a previous enquiry into the justice of the sentence ; yet, when a decree is actually executed in the country where it was pronounced, it becomes then of no further use than to protect the person who has had satisfaction under it, from restitution, which it does with the same effect, whether such restitution is sought in the nation where the sentence is pronounced, or in any other : it being a perpetual rule without any limitation that *res judicata exceptionem parit perpetuam*.’

Starkie.

Mr Starkie’s view seems to coincide with these cases ;—

‘The principle upon which a judgment is admissible at all is, that the point has already been decided in a suit between parties or their privies by some competent authority, which renders future litigation useless and vexatious. If this principle extends to foreign as well as domestic judgments, *as it plainly does*, why is it to be less operative in the former than in the latter case ? If it does not embrace foreign judgments, how can they be evidence at all ? By admitting that such judgments are evidence at all, the application of the principle is conceded ; why then, is its operation to be limited as if the foreign tribunal had heard nothing more than an *ex parte* statement and proof ?’—[Starkie—‘Law of Evidence,’ I. p. 273.]

Sir R.  
Phillimore.  
Int : Law,  
MDCCCXXXV

Sir R. Phillimore’s conclusion is ‘that the exception *res judicata* ought to be in all, and is in most states, admitted as a complete bar to a second litigation upon the subject to be adjudicated upon,’ *certain conditions being fulfilled*. The conditions, which may be set out here for convenience of reference, are somewhat similar to the pleas by which the foreign judgment may be attacked by the defendant ; others coincide with the essential conditions of identity between the two suits which are indicated on page 46. The learned author and judge stands midway between the two doctrines, asserting that the plea of *res judicata* should be admitted as a *complete bar*, but only on certain conditions ; some of which conditions coincide with the defences contended for as admissible by the opposite doctrine. The conditions are :

MDCCCXLIII

- I. The Tribunal to be competent according to the foreign law.
- II. The Tribunal to be duly seized, or possessed of the subject of its decision :—
  - Its jurisdiction must be properly founded.
  - It may not cite one belonging to the country, either by birth or domicile, or temporary residence, unless he has property or incurred some liability in the state.
- III. The foreigner must have been fairly heard according to the laws of the State, on an equality in every respect ; including the right of appeal with a native subject.
- IV. Some states add reciprocity.

Effect of  
*res judicata*  
on the  
doctrine of  
non-merger.

On the other hand, to admit the plea of *res judicata* in any form implies that there is a merger of the cause of action in the judgment pronounced upon it : and therefore the cases usually cited in support of the doctrines discussed in the second part of this chapter will now be observed to extend in their application a



Chapter I. great deal further than at first sight appeared, and to be opposed to the reception of *res judicata* in any form however modified.

For, assume the doctrine of non-merger to be maintainable.

And first suppose judgment for the plaintiff abroad, and an action brought on the original cause of action here : the defendant is then compelled to answer the case on this original cause of action independently of that on the foreign judgment : that is to say to the former he may not plead in any way *res judicata* : the judgment already given deciding the dispute between the parties in the plaintiff's favour, is treated as non-existent, and as not having affected this dispute, *quoad* their relations in this country.

Consequences of that doctrine examined. Judgment abroad for plaintiff.

Again, suppose judgment for the defendant abroad. If the cause of action is merged in the judgment, *a fortiori* the alleged cause of action \* is : but conversely, if the cause of action is not merged in the judgment, neither can the alleged cause of action be merged.† Therefore that judgment must also be treated as non-existent, and as not having affected the dispute, *quoad* the relations of the parties in this country : and therefore the defendant must answer the case on the alleged original cause of action ; that is to say he may not plead in any way *res judicata*.

For defendant.

Now, when we were considering the principles of 'Enforcing,' the enquiry took the practical form of an endeavour to discover a strict rule with regard to defences to the action ; so, when we are considering the principles of 'Recognising,' the enquiry must take the practical form of an endeavour to discover a strict rule with regard to the plaintiff's reply to the defence in bar.

Enquiry as to plaintiff's reply to the plea.

The result of the cases (taking the decisions cited to be of greater weight than those from which as we have said an opposite inference may be drawn), seems to be this ; that whereas in 'enforcing' a judgment defences will certainly be admitted, though there is much uncertainty as to what these defences may be ; in 'recognising' a judgment the bar is held to be absolute : that is, no reply will be allowed, except one putting in issue the existence of the record.

We have said that the essence of the principle *res judicata pro veritate habetur* applies with as much force to a suit by the plaintiff

\* That is to say, the cause of action which the unsuccessful plaintiff abroad supposed to be existent and in respect of which he brought the action.

† *cf.* Story :—'Now if the original cause of action is not merged in a case where the judgment is in favour of the plaintiff, it is difficult to assert that it is merged by a judgment in the foreign court in favour of the defendant.' [Conflict of Laws, § 599a.]

Story,

§ 599 a.

on his judgment, as to a defence by the defendant when he has satisfied that judgment, or when the judgment has been in his favour: if the strict principle were applicable to the former case, it would at once follow that it should be applicable to the latter: but as we see, it does not apply to the former, and Story is therefore accurate in saying that a distinction has been drawn between the effect of production by plaintiff and defendant: it is the existence of the distinction that creates the difficulty. The 'just foundation in international justice' on which he bases it is indeed hard to discover, is certainly not to be found clearly enunciated in any of the authorities. It resolves itself into a statement that 'the losing party has no right to institute a suit elsewhere.' But surely it may be said with equal force that the losing party has no right to a fresh adjudication on the suit elsewhere.

Story's inference from the cases seems accurate; but its just foundation may be doubted.

Difference between position of plaintiff and defendant.

There is in one respect however a difference between the position of the parties. The defendant is summoned to the foreign court, and therefore to a certain extent his appearance there is under compulsion, except that he has, where judgment has been given for the plaintiff, rendered himself liable to the suit by his own act: but the plaintiff's appearance there is so far voluntary, that, being presumably at arm's length from his opponent and his only remedy being at law, he must perforce choose some tribunal; and, although the defendant be non-resident and an alien, he has adopted one in his own country its laws giving that court jurisdiction over his opponent. This difference, however slight it may on analysis appear, has always been maintained: and, without anticipating the discussion on this intricate point, the consequence is that whereas the most common form of defence is 'absence of jurisdiction in the foreign court,' yet the plaintiff may not raise this question of jurisdiction by way of reply, by reason of his so-called voluntary submission to the tribunal. This indeed appears to be the ground of the Chief Justice's judgment in *Phillips v. Hunter*.

*Phillips v. Hunter.*  
2 H. Bl. 402.

The question of defences.

But this reasoning is not in any way applicable to the other defences usually met with. Again without anticipating the discussions or offering here any opinion upon them, these remaining defences may be conveniently scheduled as follows:—

Fraud of parties or court: error of court in its own law; in English law; in the law of any other nation incidentally involved; in the determination of what law is applicable to the case in its own procedure: against natural justice: contrary to International Law: contrary to public law.

Assuming them all to be good defences when alleged against

**Chapter I.** the judgment by the defendant, it seems impossible to contend that they are not good by way of reply when alleged against the judgment by the plaintiff.

Cannot really differ from the question of reply.

Viewed practically therefore, the difference between the parties should resolve itself into this: the defendant may plead to the judgment so as to negative the existence of the legal obligation or excuse the performance of it; the plaintiff should be allowed to plead in a similar manner, but in so pleading might not attack the jurisdiction of the court.

The only difference is as to the jurisdiction.

But this is a very different thing from saying that the defendant may negative the existence or excuse the performance of the legal obligation: but that for the plaintiff the question is *res judicata*, and the judgment unassailable.\*

*Phillips v. Hunter.*  
2 H. Bl: 402.

Even on this question of jurisdiction (although it may be said to be settled) the analogy between the plaintiff's creation of the foreign jurisdiction, as it is called, and a submission to arbitration which is traced by some judges, and notably by Eyre, C.J., in *Phillips v. Hunter*, does not seem to be very sound. The plaintiff has a right to bring his action in his own country, or is not to be blamed for following the defendant and bringing an action in the defendant's country; and therefore in either case there is wanting that essential ingredient in an arbitration, creation of and submission to the tribunal, by reason of which both parties are deprived of their liberty of attacking the award on the ground of error.

The analogy to submission to arbitration traced by Eyre, C. J. [cf: p. 37.]

Again, with regard to an English judgment there is one simple rule of pleading to it, it is to be tried by itself; and this whether produced by defendant or plaintiff. There is a fundamental difference between the effect of a home and of a foreign judgment: but when once this difference is established, we see that it is difficult to find any sound reason for varying the rule of pleading to it when produced by plaintiff or defendant, subject to the exception already noticed as to the jurisdiction of the foreign court.

With regard to the English judgment, the rule in both cases is, that it is *res judicata*, and therefore absolute: with regard to the foreign judgment, the rule of defence we have at present adopted is that enunciated by Lord Blackburn: The existence of the

Analogy between rules as to English and foreign judgments.

\* It must not be forgotten that for the purposes of this argument we have assumed the foreign judgment to be assailable on all the points mentioned: the degree in which it is assailable will of course be considered in due course [see chapter iv.—Defences].

obligation may be negated. This rule of defence should also be the rule of reply which we are endeavouring to formulate. The rule itself will be examined hereafter [chapter iv.], but this fundamental difference between the rules as to English and foreign judgments may here be stated generally to be dependent on considerations of public law.

Let us state this position syllogistically :—

There is an English Judgment :—

if produced by the plaintiff,—a certain rule obtains.

if produced by the defendant,—the same rule obtains.

There is a Foreign Judgment :—

if produced by the plaintiff,—a certain other rule obtains :

the variation between this rule  
and the former one being  
made on account of the  
change from an English to a  
Foreign Judgment :

The Foreign rule is to the English rule, as the Foreign Judgment is to the English Judgment.

Therefore,

if produced by the defendant,—the same rule should obtain  
(subject to the exception as to the jurisdiction.)

Recognition  
of judgment  
when for the  
plaintiff.

The question of recognising a foreign judgment as we have said arises usually when the judgment abroad has been given for the defendant, that is, when there has been a former failure to recover. There are however two cases in which the same question has been discussed when the judgment abroad has been given for the plaintiff, that is, when there has been a former recovery.

i. *Judgment for the plaintiff abroad which has been satisfied by the defendant.*

When the  
defendant  
has satisfied  
it.

An instance of this occurred in *Barber v. Lamb*. An action was brought on the original cause of action. The defence was a judgment in the Consular Court at Constantinople, and payment to the plaintiff of the sum so recovered. The plaintiff demurred ; and it was deliberately argued that the plea did not show that the court had jurisdiction in the matter : that the cause of action had not merged in the judgment of the court, and therefore was no bar to the action on that cause of action : and that the judgment

*Barber v. Lamb.*  
29 L. J. :  
C. P. 234.

**Chapter I.** could not be set up by way of estoppel nor extinguishment of the plaintiff's right of action.

'It would be contrary to all principle,' said Erle, C.J., 'for the party who has chosen such tribunal, and got what was awarded, to seek a better judgment in respect of the same matter from another tribunal.'

It is almost inconceivable that such a case should arise a second time, but it is useful to notice it as being the direct consequence of the doctrine of non-merger. If the cause of action be not merged, it is not extinguished; it therefore remains, and therefore action may be brought upon it. It is much to be regretted that the sophistry of the argument was met by an appeal to the eternal principles of justice, rather than made the occasion for a searching examination into the doctrines brought forward as the basis of the claim.

The case a consequence of doctrine of non-merger.

ii. *Judgment for the plaintiff abroad which has not been satisfied by the defendant.*

*Smith v. Nicholls.*  
8 L. J.  
C. P. 92.

An instance of this occurred in *Smith v. Nicholls*. An action was brought to recover damages for seizure of a ship. The defendant pleaded a judgment already obtained by the plaintiff in the Vice-Admiralty Court of Sierra Leone: the damages having been assessed by the Registrar and confirmed by that Court.

When the defendant has not satisfied it.

The defendant however had not appeared, and the plaintiff himself sought to establish, that the judgment was invalid by reason of this non-appearance which was caused as he alleged by the absence of notification of the proceedings; and also that the judgment was contrary to natural justice.

The plaintiff ignored his own judgment; being dissatisfied with the amount of damages.

*Hall v. Obder.*  
11 East 118.  
*Bank of Australasia v. Harding.*  
19 L. J.  
C. P. 345.

The facts of this case differentiate it from *Hall v. Obder* and the *Bank of Australasia v. Harding*, although the judgments delivered in it are, as we have seen, usually cited with them in support of the doctrine of non-merger. The plaintiff in this instance did not bring his Sierra Leone judgment forward as *primâ-facie* evidence of his claim, but, being dissatisfied with the amount of damages awarded to him by it, *ignored it altogether*, and brought another action in the hopes of getting a larger amount: and when the judgment he had already obtained was produced by the defendant, he sought to impugn its validity.

cf: p. 27.

This is another direct and mischievous consequence of the doctrine of non-merger. It is however with confidence submitted

The case another consequence



of doctrine of  
non-merger.  
cf: p. 43.

that the dictum of Erle, C.J., in *Barber v. Lamb* just cited is equally true if the words 'and got what was awarded' are omitted; although of course from the facts of that case they lend strength to the application of the principle. The salient feature of this case however is this; the plaintiff sought to prove that the Sierra Leone judgment was against natural justice not *quoad* himself, by reason of the smallness of the damages awarded; but *quoad the defendant*, by reason of his not having been served: in other words, by reason of the jurisdiction which he himself had created, but of which he now repented, and in which the defendant had by his plea acquiesced.

Chapter I.  
*Barber v.  
Lamb.*  
29 L. J:  
C. P. 234.

We have already noticed [page 27] the ground of the judgments overruling the defence; but the dictum of Blackburn, J., in *Schibbsby v. Westenholz* is completely at variance with it:—'We think it clear, upon principle, that if a person selected, as plaintiff, the tribunal of a foreign country as the one in which he would sue, he could not afterwards say that the judgment of that tribunal was not binding upon him;' and it is therefore submitted that this decision could not now be maintained.

*Schibbsby v.  
Westenholz.*  
L. R. 6  
Q. B. 155.

The case of  
mutual  
damage  
considered  
separately;  
following  
*Westlake*,  
1st ed: § 394.

There is one case where a foreign judgment is pleaded as *res judicata*, which, following Mr Westlake, may be considered separately: mutual damage; to it, the principle of the maxim applies in all its force, that one adjudication upon the subject of the dispute by a court competent to adjudicate should be sufficient, and should conclude all further enquiries:—'If there was damage incurred by both parties, through an accident which each charges to have happened by the negligence of the other; the judgment of a foreign tribunal is conclusive so as to prevent the person on whom it threw the blame, though the defendant there, from suing here on the same facts.' [Westlake.—International Law, 1st ed: § 394.] The case relied on in support of this proposition is the *General Steam Navigation Co: v. Guillon*; but the learned author adds:—'This doctrine not being directly in point, it is not positively advanced.'

*General  
Navigation  
Co: v.  
Guillon.*  
13 L. J:  
Ex: 168.

There had been a collision upon the high seas: the defendant alleged that the court at Havre, in an action in which he was plaintiff, and before which the present plaintiffs appeared to defend, had adjudged the negligence to have been on the part of the Navigation Company; and that there was no negligence on the part of the defendants: that by the law of France this judgment was an absolute and final bar to an action for the same



**Chapter I.** cause by the then defendants, the present plaintiffs. The plea was held bad *in form*, for want of a proper commencement and conclusion by way of estoppel: but it was also held bad *in substance*, for not *stating* that the present plaintiffs were French subjects, resident or even present in France when the suit began, so as to be bound by reason of allegiance or domicile, or temporary presence, by the judgment of the French court; neither did they select the tribunal and sue as plaintiffs: in any of which cases the defence would have been good:—‘They were mere strangers, ‘who had put forward the negligence of the defendant as an ‘answer, in an adverse suit in a foreign country, whose laws they ‘were under no obligation to obey.’ (Parke, B.). This seems to be in favour of a negative answer to the *quære* suggested in the marginal note [13 Law Journal, Ex: p. 169]:—‘*And, if it contained such averments; quære, whether it would have been a bar to ‘the action.*’

The case therefore seems to point to a decision in direct conflict with Mr Westlake’s proposition. But in fact there is no necessity for considering the question separately: there can be no doubt that the proposition is accurate and that it falls naturally within the principles discussed in this part of chapter i, against which a technical decision can hardly be considered as a weighty authority.

#### (b) THE EXTENT OF ‘RES JUDICATA.’

The most important question which is raised under ‘The Extent’ of the application of the doctrine of ‘Recognising’ foreign judgments is of course the absolute identity between the cause of action, to which it is pleaded in bar, and the original cause of action on which it has been given. It is at once obvious that the strictest rules are necessary upon which to proceed in order to establish this identity, and that the essential enquiry is, as Lord Ellenborough, C.J., pointed out in *Outram v. Morewood*, ‘to ‘ascertain what is the *essence* of the sentence, because the judgment is final only for its own proper purpose and object and no ‘further.’

Second consideration.  
The extent of *res judicata*.  
Identity.

*Outram v.  
Morewood.*  
3 East 346.

There is first, of course, the superficial resemblance between the two suits as to parties and causes of action; and to establish this the judgment and proceedings are produced for the inspection of the court, in order ‘to show it is a judgment between the same ‘parties and on the same matters. When the record is produced, ‘the court can compare and decide on the identity of the parties ‘and matters in issue: but, without the record of the proceedings

General resemblance as to parties and subject matter.

‘an issue is raised which the court cannot decide’ (Lord Lyndhurst, C., *in arg.* in *Ricardo v. Garcias*). Chapter I.

But to ascertain the ‘essence of the sentence’ requires more than this superficial enquiry; and the judgment of Knight-Bruce, V.-C., in *Barrs v. Jackson* already cited [p. 33], shows how jealously the court will conduct this enquiry in order to prevent former judgments being pleaded in matters with which they have no real connection, and as is natural the stringency of the rules in their bearing on home judgments is in no respect relaxed when we have to deal with foreign judgments.

*Ricardo v. Garcias*.  
12 Cl. &  
Fin: 368.  
*Barrs v. Jackson*.  
1 Y. & C  
Ch: 585.

Vinnius  
gives five  
points of  
resemblance.

The quotation from Vinnius, given on p. 34, has always been cited as an exhaustive enumeration of the essential heads of comparison, which he gives as five in number: ‘There must be ‘resemblance in all things, that is to say, in *corpus*; *quantitas*; *jus*; *causa petendi*; *conditio personarum*:’ of these, with the exception of ‘*quantitas*,’ none have lost their significance, and are as important under the English as they were under the Roman system of laws.

*Eadem  
quantitas*.

‘*Quantitas*,’ however, had an importance in Roman Law which has no counterpart with us. The division of things into fungible and non-fungible, and the identification of the former by its exact estimate in quantity or weight, points to the importance which attached to ‘quantity’ in the eyes of the writer on the Civil Law.

We propose therefore to examine this essential identity under the following heads:—Identity of subject-matter: Identity of title: Identity of relief: Identity of capacity. Foreign judgment cases unfortunately do not furnish examples in each division; where they have been wanting, recourse has been had to cases on domestic judgments.

#### i. *Identity of subject-matter* [*idem corpus*].

*Idem corpus*.

The well-known instance of the judgment in respect of a damaged hat being unsuccessfully pleaded by a Railway Company in an action for damages in respect of a personal injury is the best example of this that can be found.

The point was considered in *Callendar v. Ditrach*. The action was on a contract to sell and deliver tares, and also on a promise to ship them properly. The plea was that the plaintiff had impleaded the defendant in a Prussian court for not performing the identical promises, that that court had adjudged the plaintiff to have no cause of action in respect of the non-performance of the said promises, and that such judgment was final and conclusive.

*Callendar v. Ditrach*.  
4 M. & G. 63.

Chapter I. Tindal, C.J., said :—‘The plea professes to be an express answer to each of the specific *gravamina* set forth in the declaration. It is by no means clear that the judgment in the Prussian court relates to the same cause of action as that mentioned in the first count ; and with regard to the second we could not have seen our way without parol evidence to show that the judgment produced applied to the damage alleged to have been sustained in consequence of the improper shipping. I cannot therefore get over the first objection that the judgment before us does not apply to the same contract as this action is for. This variance between the proofs and the allegations on the records is fatal.’

ii. *Identity of title, or, Identity in right* [*idem jus*].

Premising that we are now dealing only with judgments *in personam*, this division is another form of the well-established rule of law that a judgment does not affect third parties ; in other words, that all parties to the suit and all privies to them are bound by it, and may not litigate the question a second time, but that the rights of a third party are not in the least affected by it. This rule therefore resolves itself into

*Identity of parties.*

The questions as to who are third parties or strangers and what their rights with reference to the judgment were elaborately discussed by Bell, J., in *Tebbetts v. Tilton* [New Hampshire] :—‘Parties and privies are bound by a judgment *in personam* : all who have a mutual or successive relation to the same rights ; privies in law, privies in blood, privies in estate ; all who have a right to adduce testimony, or cross-examine the witnesses introduced by the other side ; all who have a right to defend the suit, or control the proceedings, or appeal from the judgment : all others are strangers.’

*Tebbetts v. Tilton*,  
31 N. H.  
Rep : 272.

iii. *Identity of relief* [*Eadem causa petendi*].

In *Henderson v. Henderson* we have an instance of the defence in bar being successful by reason of the identity of the relief claimed in the two suits. It was attempted to re-open certain partnership accounts which it was alleged had not been taken under a reference to the Master in proceedings in Newfoundland. The decree was to compute what was due to the plaintiffs upon all the accounts in question in the pleadings : and it was further alleged that the account taken by the Master had reference only to the relations between a certain estate and the partnership.

*Henderson v. Henderson*,  
3 Hare 100.

*Eadem causa petendi*  
Example of successful defence.

Wigram, V.-C., said :—‘Where a given matter becomes the sub-  
 ‘ject of litigation in, and adjudication by a court of competent  
 ‘jurisdiction, the court requires the parties to that litigation  
 ‘to bring forward their whole case, and will not permit the same  
 ‘parties to open the same subject of litigation in respect of matter  
 ‘which might have been brought forward as part of the subject in  
 ‘contest, but which was not brought forward, only because they  
 ‘have, from negligence, inadvertence, or even accident omitted  
 ‘part of their case. The plea of *res judicata* applies not only to  
 ‘the points upon which the court was actually required by the  
 ‘parties to form an opinion and pronounce a judgment, but to  
 ‘every point which properly belonged to the subject of litigation,  
 ‘and which the parties exercising reasonable diligence might have  
 ‘brought forward at the time.

‘Now, undoubtedly the whole of the case made by this bill  
 ‘might have been adjudicated upon in the suit in Newfoundland,  
 ‘for it was of the very substance of the case there, and *primâ facie*,  
 ‘therefore, the whole is settled.’

Example of  
 unsuccessful  
 defence.

In *Hunter v. Stewart* we have an instance of the defence in  
 bar being unsuccessful. By a bill filed in equity in the Supreme  
 Court in Sydney, the plaintiff claimed to be admitted as a share-  
 holder in a certain Company in virtue of a certain certificate  
 issued to one person and transferred to him. The relief prayed  
 was in substance the same as the relief prayed by the bill in  
 England, that is to say, to be admitted as a shareholder. ‘But  
 ‘admitting,’ said Lord Westbury, C., ‘the identity in other  
 ‘particulars, the question remains is there *eadem causa petendi*, is  
 ‘there the same ground of claim, or one and the same cause for  
 ‘relief?’ The English suit was based on an equity derived from  
 a course of dealing adopted by the Company with respect to the  
 issue of shares on certificates: the suit in Sydney by reason of  
 holding a certificate.

*Hunter v.*  
*Stewart.*  
 4 De G. F.  
 & J. 168.

The Lord Chancellor overruled the decision of Wood, V.-C.,  
 in the Court below; and afterwards the learned Vice-Chancellor,  
 when delivering judgment in *Simpson v. Fogo*, expressed his  
 adherence to the decision:—‘The Lord Chancellor was of  
 ‘opinion,’ he said, ‘that the *foundation to the claim* being new,  
 ‘although in reference to the same subject matter, (and  
 ‘although it was the foundation of a claim which he possessed,  
 ‘and knew that he possessed at the time he instituted the original  
 ‘proceedings) he might file a bill in relation to that equity which  
 ‘he did not avail himself of in a former suit.

A different  
 foundation  
 to the same  
 claim may  
 give rise to a  
 second suit,  
 and will not  
 be barred by  
 the failure of  
 the first;

*Simpson v.*  
*Fogo.*  
 32 L. J.  
 Ch. 249.

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This principle of course only applies where the first suit has been unsuccessful. If on the other hand that suit has been successful, the relief having been obtained on one of the causes for seeking it, the remaining cause must evidently also merge in the judgment giving this relief.

It is sometimes said that the following remark of Lord Westbury virtually overrides the principle enunciated in *Henderson v.*

*Henderson v.*  
*Henderson.*  
3 Hare 100.

*Henderson* :—‘It is true that the case made by the second bill ‘must have been known to the plaintiff at the time of the institution of the first, and might then have been brought forward. ‘But a decree of dismissal of a former bill is not a bar to a new ‘suit asking the same relief, but stating a different case giving rise ‘to a different equity.’ But Vice-Chancellor Wigram’s proposition is that the *whole relief* must be prayed to which the plaintiff is entitled, and the whole case in support of it, or *causa petendi*, must be stated at his peril; not that all the different foundations to the claim must be brought forward at the same time.

The same relief founded on a different case giving rise to a different equity.

The whole relief must be prayed and the whole case stated.

The results of these two most important cases may be thus summarised: where the same person has two equities to the same thing, an *adverse* decision of the one is no bar to a favourable decision of the other: But where the person has one equity to a thing, he is not entitled to subdivide the subject of the equity; the adverse adjudication on the whole will be a bar to another adjudication on a part, and the adverse adjudication on a part will be a conclusive determination of the whole. Thus in either case the result is the same; the *equity* on which the suit is based, the *causa petendi* in virtue of which the relief is sought, will be once and for all decided.

Result of the two cases.

It is possible that there should be two independent rights arising from the same act: to such a case of course these rules do not apply: they include only cases of alternative rights, and this evidently was present to the mind of Coltman, J., in giving judgment in *Callendar v. Dittrich* already cited, where he says:— ‘The suit in the foreign court seems to be rather for the rescission ‘of the contract; whilst the present action is for damages resulting ‘from a breach of it. The plaintiff may not be entitled to rescind ‘a contract and yet be entitled to an action for the breach of it.’

*Callendar v.*  
*Dittrich.*  
4 M. & G. 68.

*Doglioni v.*  
*Crispin*  
L. R. 1 E. &  
1. 301.

The same point was discussed in *Doglioni v. Crispin*. There was a suit in the English Probate Court, and there had been a previous suit in Portugal. The Portuguese judgment was taken as to certain points which were in issue in the English suit, as *res judicata*: and the House of Lords upheld the course adopted by

Alternative rights.

Example of judgment for plaintiff abroad in which the foundation of the claim was the same as



in an English  
suit between  
same parties  
held *res*  
*judicata*.

Sir Cresswell Cresswell : Lord Chelmsford, C., said :—‘ Although **Chapter I.**  
‘ the objects of the two suits were in some degree different, the  
‘ parties were the same, and the facts to be established were the  
‘ same. In Portugal the object of Francisco Crispin’s suit was to  
‘ prove by the laws of Portugal his right to the inheritance of  
‘ Henry Crispin, as natural son of that person, who had been  
‘ domiciled in Portugal, and was not noble, and did die intestate.  
‘ The proceeding in the Probate Court was on a claim of the  
‘ respondent to be admitted as a contradictor of an alleged will,  
‘ which he could only be by reason of his being entitled to the  
‘ inheritance by the laws of Portugal, as the natural son of Henry  
‘ Crispin, not noble, and dying there intestate. The suit in  
‘ Portugal, therefore, covered the whole of the case before the  
‘ Court of Probate ; and as the learned Judge said, the very same  
‘ points were then raised that have been put in issue in this court.’

We have here an example of the judgment in favour of the plaintiff abroad taken as *res judicata* in another suit between the same parties, claiming a different relief it is true, but a relief more extended than, or rather the consequence of and including the relief already obtained : therefore so far as the relief already obtained went there was an absolute identity : or putting it in another way, the foundation of the claim in Portugal was also the very foundation of the claim in England. See also Lord Justice Cotton’s remarks in *Orr Ewing v. Orr Ewing*.

*Orr Ewing*  
*v. Orr*  
*Ewing*.  
8 App. ca :  
456.

iv. *Identity of capacity, or Identity of status in the parties.*  
[*Eadem conditio personarum*].

*Eadem*  
*conditio per-*  
*sonarum*.

The familiar example of this is where a man sues for the same thing first in his own right unsuccessfully, and afterwards in right of another or *vice versa* : the former decision being no bar to the second suit : The rule was thus laid down in *Metters v. Brown* :—  
‘ Whenever a person sues, not in his own right, but in right of  
‘ another, he must for the purpose of estoppel be deemed a  
‘ stranger.’

*Metters v.*  
*Brown*.  
1 H. & C.  
686.

For example, if a person sue first in his own right and fail, he will not be barred from suing as to the same subject matter as an executor.

The same  
evidence  
must support  
both suits.

Generally, and with reference to all branches of the subject of identity, Lord Westbury’s remark in *Hunter v. Stewart* is most useful :—‘ One of the *criteria* of the identity of the two suits in

*Hunter v.*  
*Stewart*.  
4 De G. F. &  
J. 168.



**Chapter I.** 'considering the plea *res judicata*, is the enquiry whether the same evidence would support both. For example, the evidence required to prove the allegations in this first bill would not sustain any of the material allegations in the second; and the evidence given in the second suit would not be receivable for want of proper allegations in the first.'

There are a few points remaining to be considered which are applicable both to 'Enforcing' and to 'Recognising' a foreign judgment. It is essential that the foreign judgment be *final and conclusive* in the country in which it was pronounced.

Other essentials applicable both to recognising and enforcing.

From two old technical decisions it appears that it was considered of vital importance to state this as an attribute of the judgment in the pleadings.

*Plummer v. Woodburne*, 7 D. & R. 25. In *Plummer v. Woodburne*, a judgment of St. Christopher which had been affirmed by the 'Court of Error in the Island, and afterwards by the King in Council' was disregarded, because the court was left in ignorance 'of the law of St. Christopher, whether a judgment in that Island would be conclusive or not.' This was followed by Erle, C.J., in *Frayes v. Worms* :—'There is no allegation here that the judgment in the court of San Francisco, assuming it to be in a proceeding between the same parties, was final and conclusive.'

*Frayes v. Worms*, 10 C. B. N. S. 149.

Apart however from the allegation of conclusiveness, it is well established that the judgment must be final :—'This court has jurisdiction to enforce a foreign judgment : but it would be new to find that it could enforce it unless it were final.' (Romilly, M.R., *Paul v. Roy*.) Thus, if it be proved that the foreign court has suspended execution on a judgment, this suspension will be recognised, and an action on it in the English courts will be stayed until the suspension is removed (*Frith v. Wollaston*).

Judgment to be final and conclusive in foreign country.

*Paul v. Roy*, 21 L. J. Ch. : 361.

*Frith v. Wollaston*, 21 L. J. Ex. : 108.  
*Hall v. Obder*, 11 East. 118.

But in *Hall v. Obder*, where the judgment was for a sum certain found to be due from defendant to plaintiff, with interest thereon from a certain day past, but with a stay of execution till the further order of the court, Lord Ellenborough, C.J., thought the action might be maintained :—'This at first struck me as an incomplete judgment, on which no action could be maintained here : but we have been pressed with the course of proceedings in our own courts, where on judgment recovered, and stay of execution on allowance of a writ of error, an action lies

'nevertheless in the meantime on the judgment.' This case how- Chapter I.  
ever would seem to be overruled.

Interlocu-  
tory judg-  
ment will not  
be enforced.

Therefore, a judgment which is merely interlocutory, will not be enforced here, for 'the court will not give relief which must be enforced by a final judgment in another country.' The bill in *Paul v. Roy* was to enforce an interlocutory order of the Court of Session in Scotland:—'If I did so, I should be carrying on the bill concurrently with the Court of Session, not having before me the whole of the parties who are before the court, or the whole of the evidence which is before the court, or the means of obtaining that evidence, or the means of doing justice between the parties' (Romilly, M.R.) In *Patrick v. Sheddin*, the Court arrived at a similar conclusion: the action was brought on an interim order of the Court of Session in Scotland, that execution might issue after a caution given, notwithstanding the pendency of an appeal to the House of Lords. Lord Campbell, C.J., said:—'This is not to be considered as a judgment, but merely as an order for execution in the meantime upon the terms prescribed: these terms are liable to variation from time to time;' and Wightman, J.:—'The very name interim order seems sufficient.'

*Paul v. Roy.*  
21 L. J.  
Ch: 361.

Interim  
order.

*Patrick v. Sheddin.*  
22 L. J.  
Q. B. 283.

Proceedings  
in the nature  
of a judg-  
ment must  
be  
equivalent to  
judgment.

So, where there have only been proceedings in the nature of a judgment or decree (as, for instance, the registering a protest of non-payment in the Court of Session in Scotland, and the issuing and execution of letters of horning and poining) it should be averred that such proceedings are, in the foreign country, equivalent to a decree. It then becomes a question at *Nisi Prius*, whether the proceedings proved are so equivalent or not. (*Hay v. Fisher.*)

*Hay v. Fisher.*  
2 M. & W.  
722.

The judgment should be definite and capable of being enforced.

In *Sadler v. Robins*, the defendant had been ordered to pay a certain sum on a certain day, first deducting thereout the defendant's costs to be taxed by the proper officer. The costs had not been taxed:—'The sum due on the decree is quite indefinite and can't be gone into here; if the decree had been perfected, it would have had effect given to it.' (Lord Ellenborough, C.J.)

*Sadler v. Robins.*  
1 Camp:  
253.

Appeal  
pending  
abroad.

The accepted doctrine in the English courts is that the finality of the judgment is not affected by the possibility, or likelihood of there being an appeal in the foreign country: nor even by the fact that an appeal is pending. 'The pendency of an appeal

**Chapter I.** 'might afford ground for the equitable interposition of the court  
 'to prevent the possible abuse of its process, and on proper terms  
 'to stay execution in the action, but it cannot be a bar to the  
 'action itself.' (Cockburn, C.J., *Munroe v. Pilkington*. Erle, C.J., *Vanquelin v. Bouard*.)

*Munroe v. Pilkington*.  
 31 L. J.  
 Q. B. 81.  
*Vanquelin v. Bouard*.  
 33 L. J.  
 C. P. 78.

Might be ground for equitable interposition.

The reason for this rule is more apparent in the case of colonial judgments in respect of which an appeal to the Privy Council may be pending. Brought thus within the jurisdiction of the mother country, the principles applicable to home judgments would be also applicable to colonial judgments; and indeed with regard to them the principle was expressly laid down in *Henderson v. Henderson*.

Appeal from Colonial judgments pending to Privy Council no bar to action on them.

*Henderson v. Henderson*.  
 3 Hare 100.

The question is often raised in the form of a defence, 'that the judgment is erroneous and liable to be reversed on appeal,' a bad plea, as we shall see in chapter iv. on 'Defences to the action.'

Mr Westlake however contends for a modification of the rule:—'But when a judgment is of no force in its own country pending the appeal, it would seem that it ought on principle to receive no force here.' [International Law, 1st ed: § 377.] And this appears to be the accepted doctrine in the United States. (*Faber v. Hovey*.) It must be confessed that this seems to follow from the former doctrine, that the foreign judgment will not be enforced unless it be final in its own country; in other words it is immaterial whether execution on the judgment be suspended by act of the court or by law.

*Westlake*, § 377.

*Faber v. Hovey*.  
 19 American Rep: 398.

*Castrique v. Behrens*.  
 30 L. J.  
 Q. B. 163.

In *Castrique v. Behrens*, the doctrine of receiving the foreign judgment as final, until it is reversed, was expounded by Crompton, J., delivering the judgment of the Court: [Cockburn, C.J., Wightman, Blackburn and Crompton, JJ.] It will be noticed that this case is the foundation of the important doctrine to be fully considered hereafter; that the English court, when a foreign judgment comes before it, does not sit as a Court of Appeal from the foreign court.

cf: p. 101.

The action was for maliciously and without reasonable and probable cause, setting the law of France in motion to the damage of the plaintiff. 'In a similar action for setting the English law in motion, it would be necessary to show,' said the learned Judge, 'that the proceeding alleged to be instituted maliciously and without probable cause, has terminated in favour of the plaintiff, if from its nature, it be capable of such a termination. 'The reason seems to be, that if in the proceeding complained of, 'the decision was against the plaintiff, and was still unreversed,

Action for maliciously and without reasonable and probable cause setting the law of France in motion.

English  
court not an  
Appeal  
Court from  
foreign  
decisions.

'it would not be consistent with the principle on which law is Chapter I.  
'administered, for another court not being a Court of Appeal, to  
'hold that the decision was come to without reasonable and pro-  
'bable cause.—There is no direct authority upon the point, but  
'it seems to us, that the same principle, which makes it objection-  
'able to entertain a suit grounded on the assumption that the  
'unreversed decision of a court in this country was come to with-  
'out reasonable and probable cause, applies where the judgment,  
'though in a foreign country, is one of a court of competent  
'jurisdiction, and come to under such circumstances as to be  
'binding in this country.' This decision was followed in *Taylor v. Ford*.  
*Taylor v. Ford*.  
22 W. R. 47.

Judgment  
to have been  
on the  
merits.

Lastly, it is essential that the foreign judgment should have been pronounced *on the merits* of the case.

A judgment therefore, recovered in a foreign court on a plea based on the Statutes of Limitation of that country, which form part of its *lex fori*, will not be recognised in this country. The leading authorities on this point are *Huber v. Steiner* and *Harris v. Quine*. The question however forms part of a very important subject, the consideration of which we propose to reserve for a separate chapter. [See chapter vi.]

*Huber v. Steiner*.  
2 Sc : 304.  
*Harris v. Quine*.  
L. R. 4  
Q. B. 653.

Pleading.

With reference to pleading, the suit and the judgment should be set out with certainty as to dates ; and should not be pleaded historically or from memory : If the defendant have no copy of the proceedings, to permit of his doing this, time will be allowed him to get a copy before pleading. (*Foster v. Vassall*.)

*Foster v. Vassall*.  
3 Atk : 587.

The judgment and proceedings need not of course be set out in full, but there should be such a description of them as to enable the court to know what was decided (Lord Brougham *in arg.* : in *Ricardo v. Garcias*).

*Ricardo v. Garcias*.  
12 Cl : &  
Fin : 368.

Foreign law.

So long as the foreign law is sufficiently apparent, upon the question whether the foreign proceedings in the nature of a judgment are by that law equivalent to a judgment, or it would seem on any other question, that law need not be set out, but only be proved in the usual way at the trial. (*McLeod v. Schultze*.)

*McLeod v. Schultze*.  
13 L. J :  
Ex : 321.

Proof of  
foreign  
judgment.

At the trial the proof of the judgment is regulated by Lord Brougham's Act (14 & 15 Vic : c. 99, s. 7), as to which see chapter iii. It has been held in a colonial case that the whole

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*McMillan*  
*v. Ritchie.*  
 2 Allen 242.  
*Palandri*  
*v. Lauthier.*  
 J. D. I. P.  
 1883. p. 87.

of the proceedings in the foreign court should be produced. (*McMillan v. Ritchie*—New Brunswick.) It is doubtful however if this is sound: the true principle would seem to be that laid down by the Italian Court in *Palandri v. Lauthier*: the documents on which the judgment had proceeded need not be produced; but the Judge may order them to be produced to clear up any questions raised.

[*cf.* p. 123  
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Single  
jurisdiction.

WE have up to the present time been concerned chiefly with questions of 'single jurisdiction;' that is to say, the action tried and judgment given in one country, the proceedings to enforce the judgment in another: this last being a question of single jurisdiction because *ex hypothesi* the judgment cannot be enforced in the country of its origin by reason first, of the absence of property belonging to the defendant, secondly, of the absence of the defendant's person.

Concurrent  
jurisdiction.

The question of 'concurrent jurisdiction' appeared however whilst we were considering the doctrine of non-merger with its attendant action on the original cause of action. We were then compelled to assume that it was possible for the same cause of action to be triable in at least two jurisdictions; but the conclusion arrived at was that having been tried and determined in one, the question ought not to be retried in another.

With the question of *lis alibi pendens* however concurrent jurisdiction is brought prominently to our notice and requires careful consideration.

General con-  
siderations  
on the  
question of  
jurisdiction.

[cf: p. 20.]

Jurisdiction in the first place may be divided into 'simple' and 'assumed:' [the second including 'contractual jurisdiction' (see p. 146)]. For the present we propose to confine ourselves to the first division; the second and the complicated questions (already hinted at during the discussion of the rule of '*jus for jus*') which arise under it will be more conveniently treated when we come to deal with the defence raising a want of jurisdiction in the foreign court.

Jurisdiction in the second place may be divided into 'single' and 'concurrent:' the meaning of these terms having already been roughly defined.

Now, jurisdiction arises first in respect of the person: that is,



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by mere residence : and not as is sometimes stated in respect of birth or domicil. Aliens temporarily resident within the limits of the realm are subject to it : Natives (*regnicoles*) and those domiciled in the kingdom cease to be subject to it *for the purposes of simple jurisdiction* when they go beyond the territory. Being subject to this jurisdiction, so far as it concerns our subject, imports obedience to the Queen's writ of summons : with regard to natives, by reason of their allegiance ; with regard to foreigners and those domiciled by reason of the protection afforded to their persons, while they are in the country.

Jurisdiction arises in respect of the person by mere residence.

Jurisdiction (in England) arises secondly in respect of property : that is, it extends over the owner of property by reason of the protection afforded to that property. It extends therefore over alien and native owners of property situate within the limits of the realm. Being subject to this jurisdiction does not of itself import obedience to the Queen's writ of summons when absent from the kingdom ; but it implies a right in the Sovereign Authority to issue execution upon the property when lawful occasion arises : It covers therefore both real and personal property [*cf.* Lord Cranworth's remarks in the *Carron Iron Co. v. Maclaren*]. Questions which arise *with reference* to property situate within or without the kingdom fall properly under the head of 'assumed jurisdiction' [see p. 136].

That which arises in respect of property.

*Carron Co. v. Maclaren.*  
5 H. L. ca. :  
416 .

From this it follows that, without introducing any question of assumed jurisdiction, mere change of residence will give the courts of more than one country jurisdiction over the defendant in respect of the same cause of action : [*cf.* Lord Camden's remarks in *Bayley v. Edwards*.]

Consequence of change of residence.

*Bayley v. Edwards.*  
3 Swanst. :  
703.

Again the general rule may be taken to be that mere residence within the territory gives a right to bring an action against another resident for a cause of action wherever arisen (with certain exceptions, to be noticed hereafter), difficult questions as to the law applicable having then to be determined ; and a suit once begun in which there was personal jurisdiction over the defendant will not be discontinued by reason of his absence during its continuance. This rule is much curtailed in some countries : [see, 'Contestations entre étrangers' in France] : In England on the other hand it is extended : and the rule practically resolves itself for the purposes of simple jurisdiction into the necessity for the defendant's residence, a plaintiff out of the jurisdiction being allowed to sue on giving security for costs. [see chapter v.]

Mere residence gives right to bring action against a resident for any cause of action.  
[*cf.* p. 131.]

But when the defendant goes into another country the plaintiff

Plaintiff out of jurisdiction has the same right.

Where same  
action is  
being tried  
in two  
countries.

may think it desirable to bring an action in that country also, without discontinuing the one already begun in England. Cases therefore occur where the same cause of action is being tried in two countries simultaneously: there then arises what is termed 'concurrent jurisdiction.' The defendant is thus harassed with two actions; and, both suits being based on a good cause of action, neither court being cognisant of the proceedings in the other, he has the prospective possibility of two independent judgments being given against him.

Equity  
interposes to  
prevent the  
double  
vexation.

Equity therefore has interposed to protect the defendant from this double vexation, to prevent the 'indecorous spectacle of two courts running a race against each other' (Lord Campbell, C., *Venning v. Lloyd*); that is to say, so far as it concerns us at present, if one of the two suits be proceeding in England, the court may be moved, if circumstances permit, for an injunction to restrain the prosecution of one of them.

*Venning v.  
Lloyd.*  
1 De G. F. &  
J. 193.

*Lis alibi  
pendens* and  
injunctions  
may be  
examined  
together.

This interposition is bottomed in the principle of universal justice: in the presumption that right will be done between the parties in whichever country the dispute be determined: a principle which is the very foundation of the whole subject of the mutual recognition of foreign judgments.

The question of injunctions is, as we shall see, of wider application than that of *lis alibi pendens*; they may however be fitly examined together. It will be convenient in the discussion to use the words 'restrain the suit:' more accurately it should be, 'restrain a person from prosecuting the suit;' because it is evident that as one court cannot issue an order to another court of equal jurisdiction in this country, neither can it to a foreign court; such an order would in either case be *brutum fulmen*. But as has already been clearly pointed out a court has, in all matters connected with its own procedure, unlimited power over the persons of all within its jurisdiction; and, acting strictly *in personam*, can order the discontinuance of a suit whether proceeding in England or abroad.

'It is evident that the English court has no jurisdiction over a foreign court which happens to have jurisdiction upon the matter of the suit.' (Sir John Leach, V.-C., *Bushby v. Munday*.)

*Bushby v.  
Munday.*  
5 Mad : 297

Power of  
English  
court to  
restrain  
prosecution  
of foreign  
suit.

'There is no doubt as to the power of the Court of Chancery to restrain persons within its jurisdiction from instituting or prosecuting suits in foreign courts; wherever the circumstances of the case make such an interposition necessary or expedient. The court acts *in personam* and will not suffer any one within

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*Carron Co.  
v. Maclaren.*  
5 H. L. ca:  
416.

‘its reach to do what is contrary to its notions of equity, merely  
‘because the act to be done may be, in point of locality, beyond  
‘its jurisdiction.’ (Lord Cranworth, C., *Carron Iron Co. v.*  
*Maclaren.*)

This has frequently been recognised in other cases to which we  
shall refer as they occur under the divisions of the subject.

We propose to consider the question under the following Division of  
the subject.  
heads :—first, applications for an injunction to restrain a suit  
there being no second suit proceeding : secondly, applications to  
restrain an English suit commenced after decree abroad : thirdly,  
applications to restrain one of two suits, when the foreign suit is  
commenced first : fourthly, applications to restrain one of two  
suits, when the English suit is commenced first : lastly, applica-  
tions to restrain a foreign suit commenced after decree in England.

This division of the subject, although in no case expressly This division  
has been  
indicated in  
the leading  
case.  
sanctioned, follows the general current of the authorities : it would  
seem however to be clearly indicated by Lord Cranworth’s judg-  
ment in the *Carron Iron Co. v. Maclaren*, and will be found useful  
in considering the numerous cases. The third and fourth  
divisions of course involve the most important propositions, and  
these are the two which unfortunately have not been kept very  
distinct, notably in the latest expositions of the subject by the  
Court of Appeal :—*McHenry v. Lewis* ; *Peruvian Guano Co. v.*  
*Bockwoldt.*

*McHenry v.*  
*Lewis.*  
22 Ch:  
D. 397.  
*Peruvian*  
*Co. v.*  
*Bockwoldt.*  
23 Ch:  
D. 225.

The subject is further complicated owing to the varied forms  
of the applications made to the court : it is now a plea in an  
action ; now to put the plaintiff to his election : at one time to  
restrain the foreign suit ; at another to restrain the English suit.  
It will be seen as we proceed, that although an application in one  
of these forms may have been refused, if it had been made in  
another it might have been entertained as more applicable to  
the circumstances of the case. Keeping this in view, we shall  
endeavour to point out as clearly as possible in every case what  
application should be made.

i. *No suit in England. Injunction to restrain foreign suit.*

‘ Even if there is no question as to the necessity, or as to the Second suit  
contrary to  
equity.  
‘ effectualness of the foreign suit, still if the party in the jurisdic-  
‘ tion of the court is instituting proceedings in a foreign court, the  
‘ instituting of which is contrary to equity and good conscience,  
‘ it will restrain the prosecution of the foreign suit, just as if it had

‘been a suit in this country.’ (Lord Cranworth, C., *Carron Iron Co: v. Maclaren.*) Chapter II.

Injunction to restrain foreign suit, there being no suit in England.

It might at first sight appear questionable whether this proposition is really applicable to this branch of the subject: but the chief case cited by the Lord Chancellor in support of it is *Lord Portarlington v. Soulby*, and in that case Lord Brougham exercised the power and restrained the defendant from suing in Ireland upon a bill of exchange given by the plaintiff for a gambling debt. It seems at the time to have been thought a large exercise of jurisdiction, and he thus defends it:—‘Nothing can be more unfounded than the doubts of the jurisdiction. That is groundless, like all other jurisdiction of the court, not upon any pretension to the exercise of judicial or administrative rights abroad, but on the circumstance of the person of the party on whom this order is made being within the power of the court. If the court can command him to bring home goods from abroad, or to assign chattel interests or to convey real property situate abroad: If, as in *Penn v. Lord Baltimore*, the court can decree the performance of an agreement touching the boundary of a province in North America; or, as in *Toller v. Carteret*, can foreclose a mortgage in the Isle of Sark; it can, in precisely the same manner, restrain the party being within the limits of its jurisdiction from doing anything abroad, whether the thing forbidden be a conveyance or other act *in pais*, or the instituting or prosecution of an action in a foreign court.’

*Carron Co: v. Maclaren.*  
5 H. L. ca:  
416.

*Portarlington v. Soulby.*  
3 My: & K.  
104.

*Penn v. Baltimore.*  
1 Ves:  
Sen: 444.  
*Toller v. Carteret.*  
2 Vern: 494.

The earliest case is *Lowe v. Baker*; but there Lord Clarendon, after advising with the other Judges, refused an injunction to Leghorn, supposing he had no authority to grant it: ‘but *quære*’—the reporter adds—‘for all the bar was of another opinion.’ The case however has never been recognised or followed in later times: it was explained by Lord Brougham as having proceeded on the ground of refusing to restrain the court, although the answer was given that the injunction was to the party within the jurisdiction: ‘a very sound answer, as it appears to me.’ And in *Campbell v. Houlditch*, Lord Eldon restrained the defendant from further proceeding in an action in Scotland.

*Lowe v. Baker.*  
1 Ch: Ca:  
67.

*Campbell v. Houlditch.*  
cit: 3 My:  
& K. 108.

Contrary to equity and good conscience.

But the institution of the foreign suit must be ‘contrary to equity and good conscience,’ otherwise the motion will be refused. Thus in *Wallace v. Campbell*, the court, while admitting its power to restrain, declined to exercise it by any interference with the foreign suit, and refused to prevent a fund being sent to Madeira

*Wallace v. Campbell.*  
4 V. & C:  
Ex: 167.

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by the English agent of an administratrix in a testamentary suit there, at the request of the debtor who was under an apprehension that he would not get justice there.

*Fletcher v. Rodgers.*  
27 W. R. 97.

The point was discussed more recently in *Fletcher v. Rodgers*, and the same principle was there enunciated, that unless there is some equity to justify it, the injunction will not issue. In that case the plaintiff had a right to sue in England on an English contract which he declined to exercise. The ship, the subject of the contract, had been seized in San Francisco, and this seizure, by the law of California, gave him a right to sue there, which he did. The Court of Appeal [James, Brett, and Cotton, LL.J.] unanimously held that he was justified in so doing; that the action might be prosecuted wherever he could call the defendant into court; and that therefore there was no sufficient ground to restrain him from proceeding with the suit. And again, in the *Liverpool Marine Credit Co. v. Hunter*, where the plaintiff finding his debtor's property in Louisiana pursued it there, knowing that by the law of that State the rights of a third person in that property would not be regarded: although this law is different to that which exists in any other country, the injunction was refused because the property was seized under process in an action which he was entitled to bring, there being an undoubted right, by the law of Louisiana, to proceed against the debtor when available property of his came within the jurisdiction of the court at New Orleans where his agent resided (Lord Chelmsford, C.).

The creditor entitled to bring action abroad.

*Liverpool Marine Credit Co. v. Hunter.*  
L. R. 3 Ch: 479.

Similarly in the converse case; if there be no suit abroad but only one going on in England, it would seem that the same principles should apply.

Injunction to restrain suit in England, there being no suit abroad.

*Bunbury v. Bunbury.*  
1 Beav: 318.

The fact however that the suit relates to immoveable property in a foreign country is not of itself sufficient (see *Bunbury v. Bunbury*, post p. 76), unless it could be proved that the courts in the foreign country have by their own law exclusive jurisdiction. Mellor, J., in the *Buenos Ayres Ry: Co. v. Northern Ry: Co. of Buenos Ayres*, an action on a contract for rent of premises situate abroad, held, on demurrer, that the defence setting up a want of jurisdiction in the English courts was bad. But it would seem to be otherwise if the suit involved merely a question as to the right to such land. (*Cood v. Cood*.)

*Buenos Ayres Ry: v. Northern Ry: of Buenos Ayres.*  
2 Q. B. D. 210.

Same principles apply.

*Cood v. Cood.*  
33 L. J: Ch: 273.

Suit relating to immoveables abroad.

There are numerous instances of attempts to restrain by injunc-



Restraint of action on foreign judgment on grounds which are properly defences refused.

tion actions on a foreign judgment, on allegations of fraud, or other matters which would more properly call for a determination whether they were good defences to the action or not : the courts have been unanimous in refusing to restrain the action. (*Ochsenbein v. Papelier* ; *Bowles v. Orr* ; *Cood v. Cood*.) And the same principle was acted on in *White v. Hall*, where the application was to restrain an act which was the consequence of a judgment abroad, a foreclosure and judicial sale. [See on this subject, 'Territorial Jurisdiction,' post. p. 136.]

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*Ochsenbein v. Papelier*.  
L. R. 8 Ch:  
695.  
*Bowles v. Orr*.  
1 Y. & C:  
Ex: 464.  
*Cood v. Cood*.  
33 L. J:  
Ch: 275.  
*White v. Hall* 12 Ves:  
321.

### ii. *Suit in England commenced after decree abroad.*

#### *Injunction to restrain English suit.*

Injunction to restrain suit in England commenced after decree abroad.

From what has already been said on the subject of *res judicata* or the plea in bar to an action on the original cause of action, it would seem to follow that the speedier course of applying for an injunction to restrain the action will be allowed. Singularly enough however there are very few cases in which this has been done : In fact the only direct instance is to be found in the old case of *Blad v. Bamfield*, in 1819, where a perpetual injunction was granted to stay proceedings against a Dane for the seizure of property of English subjects in Ireland, sentence having been given by the Danish courts upon that seizure, the Chancellor of the kingdom having confirmed the sentence, and execution having issued after confirmation.

*Blad v. Bamfield*.  
3 Swanst:  
604.

The principle was however recognised by Knight-Bruce, L.J., in *Ostell v. Lepage* ; and again by Dr Lushington in *the Griefswald* :—'I apprehend that if the court were satisfied that there 'had been a judgment on the same question, the party proceeding 'here having been plaintiff in the other court, this court would 'not allow the suit to proceed, and that too whether the proceed- 'ings had been in a British or a foreign court.'

*Ostell v. Lepage*.  
2 De G. M.  
& G. 892  
*the Griefswald*.  
Sw: 430.

Restraint from taking advantage of foreign judgment refused.

In the *Marquis of Breadalbane v. Marquis of Chandos*, a motion was made to restrain the defendant from taking advantage of a judgment of the Court of Session in Scotland. It was held however to be 'contrary to practice to assume jurisdiction in favour 'of parties who having had an opportunity of asserting their 'rights in another court where the matter had been properly the 'subject of adjudication, and in which the matter of equity was 'equally cognisable, and have either missed that opportunity, or 'have not thought proper to bring their title forward.'

*Breadalbane v. Chandos*.  
2 My: & Cr:  
711.

Reference to the discussion of *res judicata*.

The form under which *res judicata* was considered was principally as a bar to an action in England after judgment for the



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defendant abroad. The question of the injunction is independent of any consideration as to who was the successful party in the foreign suit. It was moreover discussed as a defence to the action : it might also be the ground of demurrer to the plaintiff's claim. A perpetual injunction is evidently a speedier means of nipping the litigation in the bud, and would be applicable not only to cases where judgment has been for the defendant abroad, but would be the appropriate remedy in such cases as *Barber v. Lamb*, and *Smith v. Nicholls* [cf. pp: 42, 43.]

*Barber v. Lamb*,  
29 L. J.:  
C. P. 234.  
*Smith v. Nicholls*,  
8 L. J.:  
C. P. 92.

The converse of this case falls under the fifth division, a suit commenced abroad after a decree in England, such as an order to wind up a Company in this country. The nearest approach to a parallel to this, that is to say an injunction having been granted to restrain a suit commenced in England after a foreign order to wind up a Company abroad, is to be found in the case of *Sudlow v. Dutch Rhenish Ry. Co.*; which was a bill by an English shareholder to be relieved against a forfeiture of shares : Romilly, M.R., held it a fatal objection that there was a decision of the Dutch courts opposed to the plaintiff's view.

*Sudlow v. Dutch Rhenish Ry. Co.*:  
21 Beav: 43.

For converse case see div. v. p. 81.

Restraint of suit here after foreign order to wind up company.

*Cruikshank v. Robarts*,  
6 Mad: 104.

The decision in *Cruikshank v. Robarts* may be taken to be a corollary to the principles involved in this second division :—‘ If the rights of the parties have been fully determined by the foreign court, which has proceeded to judgment, but have not yet been satisfied, the English Chancery will not interfere to enforce them, while the parties are still before the foreign court, and there is no defect in power in that forum to secure the property out of which the satisfaction must be made : though otherwise a bill will be entertained for the purpose of securing the property pending the litigation abroad.’

[*Westlake*,  
Int: Law 1st  
ed: § 395.]

*Frith v. Wollaston*,  
21 L. J.: Ex:  
108.

During the argument however in *Frith v. Wollaston*, Martin, B., suggested that as the judgment given at the Cape of Good Hope had been suspended there, an application should have been made in England to stay the proceedings on that judgment.

iii. *Suit in England commenced pending proceedings abroad.*

*Plea of lis alibi pendens.*

*Election. Injunction to restrain English suit.*

It is under this division that the subject first assumes the different forms which we have already indicated, sometimes appearing as the plea *lis alibi pendens*, and sometimes as the ground of an application for an injunction to restrain one of the suits. In his first edition Mr Westlake came to the conclusion that the

Restraint of suit in England commenced pending proceedings abroad.

plea 'was formerly bad, but that now it is considered good': in his second however he adopts the opinion of Parker, V.-C., in *Ostell v. Lepage*:—'There is no general rule that it is an answer to the English action. The proper course in such cases is to apply here to stay proceedings in one or other of the suits, and the court will, upon such an application, have no difficulty in putting the plaintiff under terms.'

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*Ostell v. Lepage.*  
5 De G. & S.  
95.

*Lis alibi pendens.*  
Decisions against the plea.

With regard to the plea there are three direct authorities against any effect being given to it. The decision of Lord Loughborough, C., in *Dillon v. Lord Alvares*; *Cox v. Mitchell*—The judgment of Erle, C.J., sums up all that can be advanced against its validity:—'Although there may be some hardship in having proceedings pending in the two countries at the same time, I think we are bound so to enforce the law as to enable the plaintiff to obtain satisfaction of his debt. There would be great danger in interfering to prevent a man from being sued in this country, when he may have left his own for the very purpose of avoiding the consequence of a suit against him there:' and *Bayley v. Edwards*, an appeal to the Privy Council from Jamaica. On the other hand in the case of *the Lanarkshire*, Dr Lushington admitted the plea, holding that if proved to the full extent it would bar the suit: and the Lords Justices in *Ostell v. Lepage* seem to have recognised its existence. It will certainly be allowed in such a case as *Law v. Garrett*, where certain partners had agreed to refer disputes to a foreign tribunal.

*Dillon v. Alvares.*  
4 Ves: 357.  
*Cox v. Mitchell.*  
29 L. J:  
C. P. 33.

*Bayley v. Edwards.*  
3 Swanst:  
793.  
*the Lanarkshire.*  
2 Spinks.  
189.  
*Ostell v. Lepage.*  
2 De G.  
M. & G. 892.  
*Law v. Garrett.*  
38 L. T. 3.  
*Orr-Ewing v. Orr-Ewing.*  
8 App. ca:  
456.

The principle was also fully recognised by Cotton, L.J., in *Orr-Ewing v. Orr-Ewing*, in the case of concurrent administration actions: the learned judge doubted 'whether there could be a plea of a pending suit,' but he did 'not doubt that it would be the duty of the court to stop a suit from going on here vexatiously and unnecessarily, when all questions could be decided in the Scotch suit by a competent tribunal:' this was approved by Lord Selborne in the House of Lords.

(H. L.J.) 9  
App: ca: 34.

There is one instance in which the plea has had the modified effect of inducing the court to order the English suit to stand over. (*Elliott v. Lord Minto*.) And again, from *Pieters v. Thompson*, Lord Tenterden's judgment in *Guinness v. Carroll*, and the more recent decisions of Sir R. Phillimore in *the Mali Ivo* and *the Delta*, it would appear that the plea is good, not absolutely to stop the English proceedings, nor to induce the court to suspend them, but to put the party to his election as to which suit he will proceed with.

*Elliott v. Minto.*  
6 Mad: 16.  
*Pieters v. Thompson.*  
Coop: 294.  
*Guinness v. Carroll.*  
1 B. & Ad:  
459.  
*the Mali Ivo.*  
L. R. 2  
A. & E. 356.  
*the Delta.*  
1 P. D. 393.

Decisions as to its effect in compelling election.

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*Wells v.*  
*Antrim.*  
3 Swanst:  
793  
*Bushby v.*  
*Munday.*  
5 Mad: 297.

But in *Wells v. Lord Antrim* the Lord Chancellor reserved power to give directions for plaintiff to proceed in this country, in case the defendants in Ireland should make it impracticable for him to proceed in the Irish suit.

In *Bushby v. Munday* there was an application to restrain a Scotch suit commenced before the English suit. The bill in Scotland was on a bond given for a gaming debt: the proceedings in England were to set aside the bond. Sir John Leach, V.-C., thus reviewed the power of the English court:—‘Where the parties, defendants, are resident in England, the court has full authority to act upon them personally with respect to the subject of the suit as the ends of justice require: and with that view, to order them to take, or to omit to take, any steps or proceedings in any other Court of Justice, whether in this country or in a foreign country. If a defendant who is ordered by this court to discontinue a proceeding he has commenced against the plaintiff in some other Court of Justice, either in this country or abroad, thinks fit to disobey that order, and to prosecute such proceeding, this court does not pretend to any interference with the other court, it acts upon the defendant by punishment for contempt.’

Examples of restraint of foreign suit though commenced first.

The Vice-Chancellor determined that the plaintiff was not to be further harassed by proceedings in Scotland, but that certain rights should be reserved to the defendant suing in Scotland: he continued:—‘But one effect of the Scotch suit, supposing it decided that the money might be recovered on the bond, may be the preferable lien by it on land in Scotland. The plaintiff must submit to such steps in Scotland either by judgment or otherwise, as will secure the benefit of that priority, subject always to the future direction of this court.’

But certain rights reserved.

*Hearn v.*  
*Glanville.*  
48 L. T. 356.

So in *Hearn v. Glanville*: an English lady had married in England a domiciled Scotchman: the settlements were in English form: the property and one of the trustees were in England: the marriage had been dissolved for the wife’s adultery by the Scotch courts: an action was commenced in Scotland by the husband for the construction of the settlement, the trustees being nominal plaintiffs: an action was then brought by the wife in England for administration of the trusts of the settlement. One of the questions to be determined was whether Scotch or English law was applicable: Pearson, J., held that, the property and nearly all the parties being in this country, it would be more convenient to try the question in England: the further prosecution of the

Convenience.

Order as to costs.

Scotch suit was therefore restrained : but the costs of the Scotch action up to date were made costs in the English action.

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Application by persons, parties in one only of the two suits.

In the *Transatlantic Co. v. Pietroni* there was an application (by persons who were parties in only one of the two concurrent suits) to restrain the English action. The plaintiffs were a ship-owning company, on whose behalf the defendant as broker had effected policies. The company had instituted proceedings in a competent court at Genoa against the defendant for an account, to which he had appeared. Before final decree in Genoa, the defendant commenced actions in England against the insurers, upon one of the policies which had resulted in a loss. Wood, V.-C., held that it was competent for the plaintiff company to file a bill to restrain the action, and to have a receiver of the policy moneys appointed pending the foreign litigation :—‘ The defendant is seeking to get possession of moneys which will belong to the plaintiffs subject to any lien which he may have if the balance of account should be in his favour.’

*Transatlantic Co. v. Pietroni.*  
Johns: 604.

Injunction to next of kin having obtained administration, by parties to foreign suit to ascertain the other next of kin.

A similar case would arise if one of the next of kin of a foreigner were to obtain administration here, pending proceedings abroad to ascertain who the other next of kin were. In such a case there might be a bill to restrain him from any dealing with the property until the foreign court had decided who were next of kin. (Wood, V.-C.)

From this we see that the court will generally not only defer to the suit pending abroad, but will assist it by protecting property in England and appointing a receiver : except in such a case as *Law v. Garrett*, where there was an agreement to refer the dispute to a foreign tribunal : even then it will do so if it is shewn that the rights of the parties cannot be sufficiently protected by that court.

*Law v. Garrett.*  
38 L. T. 3.

Convenience will be considered.

Before issuing the injunction however it would seem that the question of convenience will be considered, and if it clearly appears that the convenience of the court [and not of the parties (*Fletcher v. Rodgers*)] will be best met by having the case tried in England, or that from some cause it might be more thoroughly tried in England, an injunction will be issued on terms to restrain the foreign suit although first commenced.

*Fletcher v. Rodgers.*  
27 W. R. 97.

This would seem to have been the case in *Bushby v. Munday*, although Sir John Leach did not expressly recognise this principle.

*Bushby v. Munday.*  
5 Mad: 297.

In *Jones v. Geddes*, an injunction had been granted on a suggestion of fraud on the ground that the remedy afforded here in the case of fraud, is more effectual and complete than in the

*Jones v. Geddes.*  
1 Ph: 724.

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Scotch courts; it was however dissolved because the question between the parties might on the whole, be more conveniently litigated, and with more conclusive result there than here :

and similarly in *Kennedy v. Earl Cassilis*.

cf: note to  
*Kennedy v.*  
*Cassilis*  
(at p. 323)  
from *Ld.*  
*Notting-*  
*ham's MSS.*  
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*Kennedy v.*  
*Cassilis.*  
2 Swanst:  
323.  
*Phosphate*  
*Sewage Co.*  
*v. Molleson,*  
1 App: ca:  
780.

The question of convenience was discussed at some length in the *Phosphate Sewage Co. v. Molleson*. There was a Scotch bankruptcy; the trustee rejected the company's claim against the estate: a suit was afterwards commenced in the English Court of Chancery between the same parties and involving the same question: The Lord Ordinary refused to stay the Scotch proceedings until judgment had been delivered in the English suit, and his decision was upheld by the House of Lords. There were other parties to the English suit and it was said therefore to be more convenient to have the question tried in England. Lord Cairns, C., however refused to accept this as a self-evident proposition, there being no want of power in the Scotch court. Lord Selborne said that cases might be imagined in which the course suggested might be the proper one: but that 'at the most it could be no 'more than a question of judicial discretion.' The case instanced by his Lordship was: 'when, according to the nature of the contract between the parties, some foreign law was to determine their 'rights, it might then well be considered that the country whose 'law was in question would in its own courts be best able to inform 'the courts here of the proper application of their law to the facts 'of the case:' or again, 'if a claim dependent upon a joint cause 'of action only against a bankrupt here and other persons who 'were abroad, and if there were pending a suit abroad against 'those joint parties, some of whom would not be amenable to 'that jurisdiction, I am not prepared to say that our courts might 'not be proceeding in a very proper manner in desiring to see 'what the result of that action might be before proceeding them- 'selves to determine the claim.'

*Venning v.*  
*Lloyd.*  
1 De G. F. &  
J. 193.  
*Ainslie v.*  
*Sims.*  
23 L. J:  
Ch: 161.

Thus in *Venning v. Lloyd* the majority of the court were of opinion that convenience was in favour of the foreign suit being stayed and the English suit going on: and again in *Ainslie v. Sims*, where the court came to the conclusion that the Sheriff's Court could not do complete justice, proof having been given that certain evidence would not be admitted there.

Examples.

*Wilson v.*  
*Ferrand.*  
L. R. 13  
Eq: 362.

In *Wilson v. Ferrand*, the defendants moved to stay all proceedings pending a French suit in which the construction of the contract would be decided: this seemed a reasonable application, but Malins, V.-C., refused it, on special grounds, not considering



the balance of convenience, because it was apparent that it was made with a view to avoid answering the interrogatories to the English suit. To the same effect is *Wharton v. May*.

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Suit relating to land abroad.

Where however the question in the English suit relates to land situate in a foreign country, not necessarily involving the title to the land, and 'the foreign court, having a major jurisdiction by 'reason of the nature of the property, have a suit before it relating 'to such property,' the English court will prevent the suit proceeding here. (*Moor v. Anglo-Italian Bank*. Mellor, J., *Buenos Ayres Ry: Co: v. Northern Ry: of Buenos Ayres*). Thus in *Elliott v. Lord Minto*, questions respecting realty in Scotland were raised: and it appearing that a suit and cross suit had been already commenced in Scotland, the Vice-Chancellor ordered the case to stand over till the determination there:—this was approved in *Venning v. Lloyd*.

*Wharton v. May*.  
5 Ves: 71.  
*Moor v. Anglo-Italian Bank*. 10 Ch. D. 681.  
*Buenos Ayres Ry: v. Northern Ry: of Buenos Ayres*.  
2 Q. B. D. 210.  
*Elliott v. Minto*.  
6 Mad: 16.

Where suit abroad is by defendant in English action.

A further difficulty arises where, as in *Bushby v. Munday*, the suit in the foreign country, although relating to the same subject matter, is being prosecuted by the defendant to the suit in England. In such a case it would at first sight appear that the rationale of the doctrine of *lis alibi pendens*, the double vexation, had disappeared. But in truth the main necessity still exists for the prevention of two determinations on the same question by independent courts. And to a certain degree also there is a double vexation: for the plaintiff abroad is kept from his rights by the defence, and is harassed by a second suit here, (or *vice versa* as the case may be), and moreover the defendant in the foreign suit is *dominus litis* in this country; yet, unless some remedy were given he might so prolong the English suit as effectually to prevent the foreign plaintiff obtaining his remedy. It therefore seems essentially a case for an injunction; but as the defendant in this country is *dominus litis* abroad a protection to the plaintiff here might be given by means of a reservation in favour of the English suit being continued in case of undue delay in the prosecution of the foreign suit. This point was raised in the argument in *Hawarden v. Dunlop*: but Sir C. Cresswell, declined on general principles to stay the English suit, because only one point and not the whole question was in litigation in the other country: [see also the same question discussed under the next division, p. 80].

*Venning v. Lloyd*.  
1 De G.  
F. & J. 193.  
*Bushby v. Munday*.  
5 Mad: 297.

Where one point and not the whole suit is concurrent. [cf. p. 80.]

*Hawarden v. Dunlop*.  
2 S. & T.  
150.

Admiralty decisions.

In the Admiralty decisions the principles have been enunciated with more distinctness: they were discussed in *the Cattarina Chiazzare*, and the injunction to restrain the English suit if last com-

*the Cattarina*.  
1 P. D. 368



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*the Peshawur.*  
31 W. R.  
660.  
*the Griefswald.*  
Sw: 430.  
*the Lanarkshire.*  
2 Spinks, 189.  
*the Mali Ivo.*  
L. R. 2  
A. & E. 356.  
*the Delta.*  
1 P. D. 393.  
*the Bold Buccleugh—Harmer v. Bell.*  
7 Mo: P. C. 267.

menced was very plainly pointed out as the proper course: and this was adopted recently by Sir R. Phillimore in *the Peshawur*.

It was approved in *the Griefswald*, and, as we have seen, the plea was admitted in *the Lanarkshire*: and the doctrine of election acted upon in *the Mali Ivo* and *the Delta—the Erminia Foscolo*.

*The Griefswald* and *the Lanarkshire* however carry the principle further, and, in direct opposition to *the Bold Buccleugh—Harmer v. Bell*, establish that it is immaterial whether one of the actions be *in rem* and the other *in personam*, the two actions being alternative. The discussion of this question may be reserved for the Chapter on Judgments *in rem*. [Chapter ix.]

Concurrent actions *in rem* and *in personam*.

The general result therefore seems to be that the plea *lis alibi pendens* may have one of three consequences: to bar the English suit: to suspend the English suit: or to bar one of the suits, the plaintiff being put to his election:—that an injunction will be granted to restrain the English suit, unless the balance of convenience is in favour of it proceeding: but under certain circumstances the right to continue the English suit will be reserved.

General result.

iv. *Suit abroad commenced pending proceedings in England.*

*Injunction to restrain foreign suit.*

*Carron Co: v. Maclaren.*  
5 H. L. ca: 416.

This is the converse of the case just discussed, and the principles applicable to it were fully expounded in Lord Cranworth's luminous and exhaustive judgment in the *Carron Iron Co: v. Maclaren*. The facts of the case bring it within the last division of the subject, which forms a corollary to the present, but the propositions enunciated by the Lord Chancellor embrace both.

Restraint of suit abroad commenced pending proceedings here.

It will be remarked that the basis on which they proceed is 'pending litigation here a party institutes proceedings abroad;' the third only has been used before, it being applicable to the first division.

(1.) 'Where, pending litigation here, in which complete relief may be had, a party to the suit institutes proceedings abroad; Chancery in general considers that act as a vexatious harassing of the opposite party, and restrains the foreign proceedings.'

First proposition.  
Vexatious harassing.

(2.) 'Even though no decree has been obtained here, yet if the suit instituted abroad appears ill calculated to answer the ends of justice, Chancery has restrained the foreign action, imposing however terms which it has considered reasonable for protecting the party who was suing abroad.'

Second proposition.  
Yet terms may be imposed favouring to party suing.

Third  
proposition.  
—  
Second suit  
contrary to  
equity.

(3.) 'Even if there is no question as to the necessity or as to the effectualness of the foreign suit, still if the party in the jurisdiction of the court is instituting proceedings in a foreign court, the instituting of which is contrary to equity and good conscience, it will restrain the prosecution of the foreign suit, just as if it had been a suit in this country.'

Result of  
these three  
propositions.

[The result of the authorities as formulated in these three propositions is, that 'if the circumstances of the case are such as would make it the duty of the court here, to restrain a party from instituting proceedings in this country, they will also warrant it in imposing on him a similar restraint with regard to proceedings in a foreign court.']

Fourth  
proposition.  
—  
Not the  
duty, but in  
the dis-  
cretion of  
the court.

(4.) 'But though the authorities justify such a course, yet they will not make it the duty of the court so to act, if from any cause, it appears likely to be more conducive to substantial justice that the foreign proceedings should be left to take their course.'

A simple illustration of these principles is to be found in *Oakeley v. Ramsay* where a Scotch suit was stayed because the English courts had prior seisin of the matter.

*Oakeley v.  
Ramsay.*  
W. N. 1872  
p. 235.  
*Bunbury v.  
Bunbury.*  
1 Beav: 318.

In *Bunbury v. Bunbury*, an English testamentary suit, an injunction was granted on terms to restrain a suit pending in Demerara to recover real property there, although complicated questions dependent on the law of Holland were in controversy in this country.

In *Duprez v. Veret*, an application to restrain the English suit, the plaintiff had propounded the will of the deceased who was domiciled in France, where proceedings had been instituted to try the validity of the will in dispute: but the defendant did not raise any question of domicile. Sir J. P. Wilde refused to suspend the English action, merely 'to allow a decision to be given in another on perhaps a totally different question. The English domicile is admitted on the pleading, and the question is the execution of the will according to English law. In France the question is whether the deceased was a domiciled Frenchman.'

*Duprez v.  
Veret.*  
L. R. 1  
P. & D. 583.

In adminis-  
tration suits.

In *Graham v. Maxwell* there was an administration suit proceeding in England: a creditor in ignorance of it commenced a suit in a foreign court to recover his debt: an injunction was granted: but in *Crofton v. Crofton, re Boyse* it was refused, although the claim had been proved but afterwards withdrawn and the

*Graham v.  
Maxwell.*  
18 L. J.  
Ch: 225.  
*Crofton v.  
Crofton, re  
Boyse.*  
49 L. J.  
Ch: 689.

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action commenced abroad, because the creditor was out of the jurisdiction. Malins, V.-C., intimated that any judgment that might be obtained would be ineffectual because the creditor had already submitted his claim to the jurisdiction of the court.

*Wedderburn v. Wedderburn.*  
4 My: &  
Cr: 585.

So in the older case of *Wedderburn v. Wedderburn* Lord Cottenham, C., laid down the general rule; he established however a proviso with regard to the foreign suit in the plaintiff's favour, resembling that of suspension of the English suit recognised in the preceding division:—'The general rule precludes parties from 'proceeding in any other court for the same purpose for which 'they are proceeding in this court, whether the other proceedings 'are taken in this or in any other country: And if the party conceives there are circumstances in his case which constitute an 'exception to the rule, I think his proper course is, not to take 'proceedings in another country of his own authority, but to 'apply to this court for permission to take such proceedings.'

Example of  
partial stay  
only of  
foreign suit.

'These two propositions proceed on convenience in order to 'prevent litigation, which the court has considered either unnecessary, and therefore vexatious, or else ill adapted to secure 'complete justice.'

The plaintiffs were allowed to adopt such proceedings in Scotland as would ensure them the means of satisfying what should be found to be the amount due to them in the English suit: 'because 'the property being there, there is no mode in this country by 'which that security can be obtained. The plaintiff might ascertain the amount of the demand and might be unable to enforce 'payment of it. This course saves time rather than going to 'Scotland afterwards. The defendants are not to be doubly 'vexed: but the suit in Scotland is to secure payment of an 'amount to be found due here.'

The principles which will guide the court in determining the question of convenience in these cases will of course be the same as in the third division: and this was acted upon in *Dawkins v. Simonetti*, where a suit was in progress here claiming probate in solemn form: the defendant appeared under protest and set up a subsequent will revoking the other, and then commenced a suit in Naples for a decree affirming its validity—on the grounds that the testatrix died domiciled in Naples: that the question to be decided was one of fact as to the execution of the will: that the witnesses were in Naples: and that the English courts were bound to give credit to foreign tribunals for knowing and deciding property on their own law. Jessel, M.R., considered that it would

Convenience.

*Dawkins v. Simonetti.*  
50 L. J:  
P. 30.

be more convenient for the question to be tried in the Neapolitan courts, and restrained the English suit.

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Two recent  
decisions  
examined.

There have been two recent decisions on the subject : they both come within this division, but the Court of Appeal in both instances proceeded on general principles, and it is somewhat remarkable that in both much stress was laid by so learned a judge as Sir George Jessel, M.R., on the absence of authority. The arguments contained no reference to the two leading cases *Wedderburn v. Wedderburn* and the *Carron Iron Co. v. MacLaren*, Lord Justice Cotton alone alluding to them in his judgment.

*Wedderburn v. Wedderburn.*  
4 My. & Cr. 585.  
*Carron Co. v. MacLaren.*  
5 H. L. ca. 416.  
*McHenry v. Lewis.*  
22 Ch. D. 397.

The first of these cases is *McHenry v. Lewis*, in which judgments were delivered by Jessel, M.R., Cotton and Bowen, LL. J. During the course of an action in England, a similar action was commenced in America by the plaintiff against the present defendants and others, the scope of the two suits being substantially though not identically the same. The case came before the court on appeal from a refusal of Chitty, J., to stay all further proceedings in the English action. It may be gathered, from what has gone before, that the motion was ill conceived unless special grounds of convenience for that course could have been established : but that a motion for restraining the American suit would have been entertained as the defendant was within the jurisdiction. The court however as we have said decided on general principles—*Cox v. Mitchell* was discussed, and so far as the general doctrine which it is supposed to decide, it may be said to have been overruled, if it were not virtually so before. With regard to the concurrent actions, it will be remembered, that Lord Cottenham's judgment in *Wedderburn v. Wedderburn* clearly considered them unnecessary as of course *and therefore vexatious*; Jessel, M.R., however expressed a contrary view :—‘Where two actions are brought in this country there is *prima facie* vexation. It is possible that the same observation might be made as regards the Queen's courts in any other part of the world. But where a right is being enforced in a foreign country, it certainly appears to me that we cannot draw the same inference. Not only is the procedure different, but the remedy is different. He might have a personal remedy in one country, and a remedy against the goods in another. He may have a remedy against the real estate in one country and no such remedy against the real estate in the other. It is by no means to be assumed, in the absence of evidence, that the mere fact of suing in a foreign country as well as in this country is vexatious.’ The necessity for the two actions rests there-

*Cox v. Mitchell.*  
29 L. J. C. P. 33.

Lord  
Cottenham  
considered  
double  
actions  
vexatious as  
of course ;  
Jessel, M.R.  
as only  
*prima facie*  
vexatious ;

on the  
ground of  
difference in  
remedy.

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fore on the possibility of obtaining another remedy abroad. But at best it can be only an alternative remedy, and as we have seen, the pendency of an action *in rem* may be the ground of restraining an action *in personam*, where from their nature the remedies sought are alternative. The learned judge thought that, with a view of getting a speedy trial, it might be eminently desirable to let both actions go on : and that, since one judgment must be given before the other 'some application might be made which would prevent 'the other action proceeding.' But, supposing judgment given in America first, this reference to the second division of the subject as being the safest course to pursue in the interests of speedy justice, would seem to imply the existence of a doubt in the learned judge's mind as to the expediency of the law expounded in the cases coming under this and the preceding division.

But these two remedies can only be alternative.

It will be noticed that the defendants in the English suit were not all of them parties to the suit in America, and that both related to a reconstruction scheme of an American Railway Company. The difficulty with regard to the identity of the parties might have been got over by accepting an offer made by those defendants who were not parties to the American suit of a personal undertaking to allow judgment to be entered up against them in England if judgment were obtained in America. With regard to the subject matter being American it is remarkable that the question as to the convenience of the American suit proceeding was not argued. Cotton, L.J., based his decision on the very great distinctions between the two suits.

The parties were not all the same.

*Peruvian Co: v. Bockwoldt.*  
23 Ch: D.  
225.

The second case is the *Peruvian Guano Co: v. Bockwoldt*, in which judgments were delivered by Jessel, M.R., Lindley and Bowen, LL.J. There was an action in England in respect of the cargoes of seven vessels : the plaintiffs also instituted proceedings in France in respect of the cargoes of six of the vessels. The case came before the court on appeal from a refusal of Bacon, V.-C., to order the plaintiffs to elect which action they would proceed with, the Vice-Chancellor considering that there was no authority for the application.

It would seem at first sight that the authorities cited in favour of putting the plaintiff to his election under the last division would be equally applicable in the present case. The doctrine of election is really a modification of the defendant's success with the plea *lis alibi pendens*, in favour of the plaintiff, he having presumably a right to bring either of the actions. But the learned Vice-Chancellor seems to have doubted its existence, holding that

*Bacon, V.-C.,* doubted the existence of the doctrine of election.



The suits  
were not  
identical.

*Jessel, M.R.*,  
elaborated  
his previous  
views of  
vexation.

One suit for  
six cargoes,  
the other  
for seven.

*Pieters v. Thompson* was to be explained by the fact that the plaintiff had of his own accord elected, proof of this being required by the court. It would scarcely be entertained on a motion for an injunction to restrain one of the suits. The real grounds of the decisions both of the Court of Appeal and of the court below were that the suits were not directly alike, and that the remedies claimed were different. *Jessel, M.R.*, elaborated what he had said in the previous case on the subject of vexation. The second action might be vexatious, and relief granted by staying it, where it is so utterly absurd that the Judge sees it cannot possibly succeed, and that it is brought 'only for annoyance': or where 'the plaintiff not intending to annoy or harass the defendant, but thinking he would get some fanciful advantage sues him in two of the Queen's courts at the same time. But if there are some substantial reasons to induce him to bring the two actions, why should we deprive him of the right?' He based his decision on the fact that the English action being in respect of seven cargoes, and the French action in respect of six, it would be impossible to do more than compel the election between so much of the subject matter of the one action as is embraced in the other. 'We should not' said *Lindley, L.J.*, 'attain the result desired; we should not wholly stop one action out of two; both would be going on, one in France for six cargoes, and one in England for the seventh. There are certainly reasons, not frivolous reasons, not harassing reasons, for bringing the action in France. We cannot compel the plaintiffs to abandon that. The cargoes were in French ports.'

This decision is remarkable. The authorities are clear that the French action could have been stayed, the plaintiffs being within the jurisdiction; but that was not the motion before the court. If the English action had proceeded and judgment been given for the plaintiff, an action on that judgment could have been brought in France. If the balance of convenience was in favour of the French action, the English action could have been suspended, an undertaking being given by the defendants as in the last case, to abide by the French judgment in respect of the seventh cargo. By either course the vexation of two suits might have been avoided.

Both decisions are therefore, with regard to the general doctrine, with the greatest respect, eminently unsatisfactory.

When suit  
abroad is by  
defendant in  
English  
action.  
[c/: p. 74.]

Under this division we have the same further difficulty that presented itself under the previous division, where the suit abroad is brought by the defendant to the English suit. In *Dawkins v. Simonetti* *Jessel, M.R.*, treated the question in the

*Dawkins v.  
Simonetti.*  
50 L. J:  
P. 30.



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*Hyman v. Helm.*  
24 Ch. D.  
531.

*McHenry v. Lewis.*  
22 Ch. D.  
397.  
*Peruvian Co. v. Bockwoldt.*  
23 Ch. D.  
225.

ordinary way, and allowed the defendant to continue the suit abroad although commenced last, the balance of convenience being in favour of that course. The subject was very recently discussed by the Court of Appeal in *Hyman v. Helm*. Brett, M.R., hinted that if the defendant after counter-claiming in an English suit brought an action abroad, the case would fall under the general rules. But the Court extended the principle laid down in *McHenry v. Lewis* and *Peruvian Guano Co. v. Bockwoldt* that concurrent suits are *prima-facie* vexatious only, and not vexatious as a matter of course, and held therefore that the injunction was rightly refused, the plaintiff not having proved the vexation. The decision however seems to have been much influenced by the fact that the suits were not absolutely identical: the defendants were sued in England as agents: Brett, M.R., declined to say what would have been the result if they had sued in San Francisco as agents; they were in fact suing as vendors, and this fact seems to afford the key to the decision.

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When counter-claim here.

[cf. pp. 78, 79.]

Identity of suits.

v. *Suit commenced abroad after decree in England.*  
*Injunction to restrain foreign suit.*

This division being a corollary to the former one, although it rests on higher ground, the existence of a decree in this country, the main principles of Lord Cranworth's propositions are equally applicable to it.

Restraint of suit abroad commenced after decree here.

*Beckford v. Kemble.*  
1 Sim. & S. 7.

*Harrison v. Gurney.*  
2 J. & W.  
563.

*Beauchamp v. Huntley.*  
*Clarke v. Ormonde.*  
Jac. 546.

*Eustace v. Lloyd.*  
25 W. R.  
211.

For example, in *Beckford v. Kemble*, an injunction was granted to restrain the mortgagees of a West India estate from proceeding on a bill of foreclosure in the Colonial Court of Jamaica, filed after a decree made in England on a bill to redeem, which directed an inquiry to ascertain the amount of the mortgage debt: all the parties were in this country. And in *Harrison v. Gurney*, where trustees for creditors after a decree for execution of trusts, were restrained from proceeding in the Irish Court of Chancery for the same objects.

Examples.

This was followed in *Beauchamp v. Marquis of Huntley*: *Clarke v. Earl of Ormonde*, where after decree for administration of the testator's estate in England and Ireland, an incumbrancer on the Irish estate, having come in and proved his debt, was restrained from proceeding in a suit in Ireland, receiving costs up to the time of having notice of the decree, and paying costs of the application.

Administration suits.

Costs.

So in *Eustace v. Lloyd*, where there had been a decree in an administration suit directing an account of the testator's debts and an inquiry as to incumbrances affecting the real estate. The

prosecution of a suit in Ireland for specific performance of an agreement for a lease of lands in Ireland and which the executors did not dispute was restrained by Bacon, V.-C.

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And *Hope v. Carnegie*, where a British subject entitled to real and personal estate in England and the Netherlands, died domiciled in England, and there had been a decree for administration. One of his children was restrained from continuing proceedings in the Netherlands for administration of the property there. (Stuart, V.-C., upheld by the Lords Justices.)

*Hope v. Carnegie*.  
L. R. 1 Ch :  
320.

From what has already been said, it follows that it is no ground for refusing the injunction that the cause of action arose in the country where the suit is being prosecuted. (*Graham v. Maxwell*.)

*Graham v. Maxwell*.  
18 L. J :  
Ch : 225.  
*Carron Co : v. Maclaren*.  
5 H. L. ca :  
416.

General  
doctrine.

Generally, in the words of Lord Cranworth, C., in the *Carron Iron Co : v. Maclaren*, the law may be stated as follows :—‘After a decree under which the creditors of a testator may come in and obtain payment of their demands, the court does not permit a creditor to institute proceedings for himself. The decree is said to be a judgment or in the nature of a judgment for all creditors : but the Court is unable to interfere with a foreign creditor resident abroad suing for his debt there.’ The question would then of course be left to the foreign court. The principle is equally applicable to an English creditor suing abroad under similar circumstances.

With regard to the terms imposed referred to in the second proposition, *Beckford v. Kemble* may be taken as an example : in that case the order was made ; ‘the plaintiff, by her counsel, undertaking to consent to any order to be made in the suit in Jamaica which this court shall at any time think reasonable.’ This was approved and followed in *Bunbury v. Bunbury*.

*Beckford v. Kemble*.  
1 Sim : &  
S. 7.

*Bunbury v. Bunbury*.  
1 Beav : 318.

Winding up  
companies.  
25 & 26 V.  
c. 89. s. 87.

In the case of winding up companies, although there can be no doubt of the court's power to exercise a similar jurisdiction irrespective of statute, the question has been dealt with by s. 87 of the Companies Act 1862, which it must be noticed extends the power to all actions, not only those commenced after the winding up but also to those already proceeding.

### 25 & 26 Vic : c. 89, s. 87.

When an order has been made for winding up a Company under this Act no suit, action, or other proceeding shall be proceeded with or commenced against the Company except with the leave of the court, and subject to such terms as the court may impose.

*re International Pulp Co :*  
3 Ch : D.  
594.

In *re International Pulp Co.*, Jessel M.R., expressly declared

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that this section (and it is presumed also, the other sections analogous to it) extended to actions wherever commenced, so long as (and presumably, whenever) the court has jurisdiction over the creditor's person:—‘I can't restrain a creditor in Turkey or Russia bringing his action there, but I can, although the action is brought abroad, when the court has jurisdiction to enforce it, that is, jurisdiction over the creditor.’ This is in direct opposition to the opinion of the Lords Justices in *re Oriental Steam Co.*, *ex parte Scinde Ry. Co.*:—‘Sections 87 and 163 apply only to courts in this country: Parliament never legislates respecting strictly ‘foreign courts.’ As we have seen the jurisdiction is purely personal: nevertheless in that case a creditor who had obtained a judgment in India before the English winding up order was not allowed to attach property in India belonging to the Company. But although the Act does not apply to India and the Colonies, and therefore a suit can be brought there against a company being wound up in England, it would seem that the Colonial courts ‘on a representation being made showing circumstances that would render it proper that the suit should be stayed, would undoubtedly entertain the application, and would do what is just and right to assist the Court of Chancery in winding up the company.’ (Couch, C.J., *Bank of Hindustan v. Premchand.*—Bombay.)

The section explained by *Jessel, M.R.*

*re Oriental Co.*, *exp. Scinde Ry.*: L. R. 9 Ch: 557.

*Bk. of Hindustan v. Premchand.*, 5 Bomb: H. C. Rep: 83.

These principles are equally applicable to cases in Bankruptcy. But this power of restraining suits has also been provided for by section 10 (2) of the Bankruptcy Act, 1883, which, as in the case of companies, refers to actions in progress at the commencement of the bankruptcy, or commenced during its continuance.

Injunctions in bankruptcy. 46 & 47 V. c. 52, s. 10 (2)

## 46 &amp; 47 Vic: c. 52, s. 10.

(2) The court may at any time after the presentation of a bankruptcy petition stay any action, execution or other legal process against the property or person of the debtor, and any court in which proceedings are pending against a debtor may, on proof that a bankruptcy petition has been presented by or against the debtor, either stay the proceedings or allow them to continue.

Discretionary powers as to stay of proceedings.

## s. II.

Where the court makes an order staying any action or proceeding, or staying proceedings generally, the order may be served by sending a copy thereof, under the seal of the court, by prepaid post letter to the address for service of the plaintiff or other party prosecuting such proceeding.

Service of order staying proceedings.

But all debts and liabilities, whether contracted at home or abroad, are proveable in the bankruptcy, and of course may form

The same principle is applicable.

the subject of actions, either in this country or abroad; and therefore as before, the section must apply to all actions in respect of such debts, whether proceeding in this or in another country: that is to say, such actions will be restrained if the party to whom the injunction must issue be within the jurisdiction.

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It is often said that during the pendency of bankruptcy proceedings an Englishman may be restrained from bringing an action abroad, but neither the general theory nor the cases support such a general proposition.

In *ex parte Ormiston, re Distin*, an injunction was granted against an English creditor resident in England, but who was suing in a foreign court for a debt incurred in England.

*exp:*  
*Ormiston,*  
*re Distin.*  
24 L. T.  
197.

In *ex parte Tait, re Tait*, the injunction was granted to restrain the prosecution of an action in Ireland upon a claim which, if due, was proveable under a deed of inspection; and depending upon a question which must have been decided here.

*exp:*  
*Tait, re*  
*Tait.*  
L. R. 13  
Eq: 311

This was the principle on which *Maclaren v. Stainton, Maclaren v. the Carron Iron Co.*: was decided: the discussion in the case turning, it will be remembered, on whether the company could be considered within the jurisdiction or not.

*Maclaren v.*  
*Stainton*  
*Maclaren v.*  
*Carron Co.*  
26 L. J.  
Ch: 332.

So, in *re Chapman*, where actions had been begun in New York by persons residing there: the Court refused to make an order which must of necessity have been *brutum fulmen*, as it had no means of enforcing it against the foreigner: Bacon, V.-C., however gave leave to the receiver to appear and defend the actions in America.

*re Chapman*  
L. R. 15  
Eq: 75.

This principle was again acted upon in *Pennell v. Roy*: An action was brought by a Scotch creditor in Scotland, who had not proved under the English bankruptcy, against the assignees to recover out of the bankrupt's Scotch reality an amount equal to the dividend which would have been payable on the debt: The proceedings were shown to be frivolous and vexatious, and to have no chance of success. The defenders instead of meeting the suit in Scotland instituted a suit in England, 'equally 'frivolous but less vexatious,' for the purpose of staying the other. Kindersley, V.-C., granted the injunction, but the Lords Justices over-ruled his decision:—'It is not the duty or function, or within 'the power of the court to restrain men from prosecuting frivolous, 'litigious, and desperate suits, merely because they are so,— 'at least unless the experiment shall have been repeated once 'or twice. A creditor who has not proved or claimed, nor seeks 'to prove or claim under an English bankruptcy, is under no

*Pennell v.*  
*Roy.*  
3 De G.  
M. & G. 126

Cases in  
which the  
injunction  
has been  
refused.

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'obligation, nor owes any more duty to the assignees, or the other creditors, than he would if he were no creditor at all, and consequently, if he enters into a foolish and perverse litigation with the assignees, they must defend themselves as other men do when prosecuted by the owner of an imaginary grievance.' (Knight-Bruce, L.J.) And from Turner, L.J., we have once more a recognition of that principle which underlies the whole subject of foreign judgments:—'I have less hesitation in refusing to grant the injunction, because it is the duty of this court to give credit to foreign courts for doing justice in their own jurisdiction, because, if it is assumed he ought to succeed in his Scotch proceeding he ought not to be interfered with here: and the contrary assumption cannot give an equity to the assignees as plaintiffs against him.'

Application  
of general  
principle.

But the difficulty now arises, suppose the foreign debt proved under the English bankruptcy, and the creditor, still resident abroad, brings an action in the foreign court. In other words, if the creditor has become a party to the English bankruptcy by proving his debt under it, will the court then have jurisdiction over him to order him to desist from his suit?

Where  
foreign  
creditor is a  
party to  
bankruptcy.

It may well be doubted whether such power exists: the general principles certainly give a negative answer to the question. It must be left to the foreign court to act as it thinks best. This point will be discussed when we come to deal with the effect of an English adjudication abroad. [post chapter x.]

What power  
the English  
court has.

It would seem however that the English court will under such circumstances entertain an application to expunge the proof, if the dividends have not already been paid.

May  
expunge  
proof.

exp:  
*Cotesworth,*  
*re Vanzeller.*  
1 Dea. &  
Ch: 281.

Such an application was made in *ex parte Cotesworth, re Vanzeller*: in that instance however the court refused to accede to the request in the absence of all evidence as to the nature of the proceedings abroad: because it did not appear whether the foreign process was a satisfaction of the debt or even security for it, and it would be unjust to expunge proof and turn it into a claim.

*Cockerell v.*  
*Dickens.*  
1 M. D. &  
De G. 45.

Thus in *Cockerell v. Dickens* an injunction granted by the Indian courts to restrain a foreign creditor from taking advantage of a foreign decree ordering the sale of an estate belonging to the bankrupt in another country was dissolved on appeal to the Privy Council, although he had proved for his whole debt under the bankruptcy and had received his dividends. But an injunction to stay the receipt of further dividends till a suit begun out of the



jurisdiction by a creditor within should be abandoned, was sustained. Chapter II.

Thus the principle enunciated in *Selkrig v. Davis* follows as a corollary from this doctrine. It was there held that a person cannot come under an English commission without bringing into the common fund any money that he may have already received abroad: This was approved in *Cockerell v. Dickens* and *re Kelson, exp: Egyptian Trading Co.*, and followed in *Bank of Portugal v. Waddell, re Hooper*; and thus extended in *ex parte Wilson, re Douglas*; 'or, until after the other creditors have received 'a dividend equal to that received by the creditor abroad.'

In *ex parte Robertson, re Morton*, Bacon, C.J., held further that a foreign creditor having proved in the English bankruptcy had brought himself within the jurisdiction of the Bankruptcy Court, and, the notice of motion being regularly served out of the jurisdiction, that he could be ordered to refund the money he had already received, although he had only proved for the balance: he would then of course be entitled to prove for the whole debt.

But a foreign creditor because he happened to be in England would not be obliged to bring what he had received into the common fund, but might ignore the English bankruptcy until he sought to obtain some benefit from it.

There may however be concurrent bankruptcy proceedings in two countries: the act gives the court no power to stay one of two such proceedings: the question will be more properly dealt with under the head of 'the effect of a foreign bankruptcy' [see chapter x]. It will be sufficient to say here that the general principles apply, and that the rule of priority will be observed.

Speaking generally therefore the maxim *nemo debet bis vexari pro eadem causa*, including as it does both the doctrines of *lis alibi pendens* and of *res judicata*, is applicable as well to foreign proceedings as to English. And by way of general summary to the consideration of the former doctrine it may be stated to be as follows:—

Where the defendant is harassed by two actions for the same cause in different countries, some assistance will be afforded to him by the English Courts, *proceeding equitably*; restraining the continuance of the suit last commenced (unless the charge of vexation is disproved): *proceeding on the ground of convenience*; suspending the continu-

*Selkrig v. Davis.*  
2 Rose 291.  
*Cockerell v. Dickens.*  
1 M. D. & De G. 45.  
*re Kelson.*  
L. R. 4 Ch: 125.  
*Bk: of Portugal v. Waddell.*  
11 Ch: D. 317 [on app:]  
5 App: ca: 161.  
*exp: Wilson, re Douglas.*  
7 Ch: D. 490.  
*exp: Robertson, re Morton.*  
L. R. 20 Eq: 733.

Concurrent  
bankruptcy  
proceedings.

General  
summary.



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ance of either suit, according as to which court is less likely to arrive at a correct decision upon the case :

and in cases where it appears altogether immaterial in what court the plaintiff should obtain redress, the remedies being alternative, waiving its own authority of deciding as to the greater competency of one forum over another, and putting the plaintiff to his election as to which suit he will continue.

There remain two important points to be considered—Identity of suits, and Jurisdiction. Identity of suits.

It is evident that the same principles which were considered under *res judicata* as to the identity of the two suits apply here in all cases, and it is frequently expressed by the words ‘in which complete relief may be had,’ as in Lord Cranworth’s first proposition : of this *Imlay v. Ellefson*—an application to hold the defendant to bail on account of his absence from the jurisdiction, to which it was replied that he was already held to bail in Norway—and *Naylor v. Eagar* are examples.

*Imlay v. Ellefson.*  
2 East 453.

*Naylor v. Eagar.*  
2 Y. & J. 90.  
*Booth v. Leicester.*  
1 Keen 579.

In *Booth v. Leicester*, Lord Langdale, M.R., implied that an injunction would be granted in England in cases where the English adjudication could be pleaded as *res judicata* in the foreign court.

*Bushby v. Munday.*  
5 Mad : 297.

In *Bushby v. Munday*, there was a bill in England to set aside a bond given for a gaming debt : in Scotland there was a bill on the bond : Although the ultimate consequence was not the same, for the English suit involved the cancellation of the bond, the same question had to be considered—whether by the law of England money could be recovered on the bond.

*the Lanarkshire.*  
2 Spinks  
189.

To this principle also may be attributed Dr Lushington’s decision in *the Lanarkshire*, in which the pendency of an action *in personam* was allowed to be pleaded to an action *in rem* for the same cause : the men had commenced an action for wages against the ship in England, and also one against the master for the same wages in Canada : Although one action was *in rem*, and the other *in personam*, yet the same question was involved in both, the responsibility of the owner : the two methods by which the wages could be recovered being alternative, the proceeding *in rem* being only an extra remedy for the protection of the seamen.

Concurrent actions *in rem* and *in personam*.

The cases cited afford numerous other examples.

*Hawarden v. Dunlop.*  
2 S. & T.  
189.

A new principle has however been introduced. In *Hawarden v. Dunlop*, the principle of Sir C. Cresswell’s decision was that one point only out of many in litigation in this country would be

It is necessary that one of the suits be completely stayed.

decided by the foreign court. And this is to be found expressed in another form in the *Peruvian Guano Co: v. Bockwoldt*; the facts of which case have been already set out [p. 79]. The principle may be expressed as follow: If the failure in identity in this respect would militate against the desired result (the complete suppression of one of the suits) being arrived at, the application will not be entertained in any form.

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*Peruvian  
Co: v.  
Bockwoldt.*  
23 Ch: D.  
225.

Partial  
identity.

Another instance of this partial identity is to be found in *Orr-Ewing v. Orr-Ewing*; the principle was however somewhat limited by Cotton, L.J.—‘If in working out the administration of a decree now to be made, a question should arise turning on Scotch law about which there is any substantial doubt, undoubtedly the court, if there were a suit there, would wait until that suit had decided the question; or if there were no such suit, would send the question to be decided by a Scotch court.’ In the case there was an administration suit in England, and a suit in Scotland as to an account between the testator’s estate and his partners: [see also *Doglioni v. Crispin*: ante p. 49].

*Orr-Ewing  
v. Orr-  
Ewing.*  
22 Ch: D.  
456.

*Doglioni v.  
Crispin.*  
L. R. 1  
E. & I. 301.

Jurisdiction. We then come to the important question of jurisdiction.

The rationale of the grant of the injunction is that the *person* enjoined is within the jurisdiction.

We shall have to discuss in its proper place the question of constructive service of writs on foreign corporations with agencies in this country. In the *Carron Iron Co: v. Maclaren* it was endeavoured to extend these rules in their entirety to the issuing of an injunction, and the question was elaborately discussed by the Law Lords.

*Carron Co:  
v. Maclaren.*  
5 H. L. ca:  
416.

Constructive  
jurisdiction  
of English  
court over  
party against  
whom  
injunction  
asked.

Case of a  
foreign  
corporation  
with offices  
in England.

The Company had offices in different parts of England and Scotland: they also had agents in England holding goods of the Company of large value consigned to them for sale: but these agents in no wise represented or acted for the Company except in selling the goods entrusted to them. The Company were possessed of real property in England. It was said that even treating the appellants as a Scotch corporation, still they must be looked at as a body so established or represented in this country as to justify the courts in treating them as parties within the jurisdiction, and making orders on them accordingly. Lords Cranworth and Brougham refused to accept the argument, and held that the Company was domiciled in Scotland; and that the fact of its having real property in this country, while enabling the court to make any injunction it may issue effectual, would not

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‘justify the issuing of an injunction :’ and further, that an agent, although he can in some cases sue and be sued, cannot be served with an injunction issued to his principal. Lord St. Leonards however was of opinion that ‘the Company’s domicil could not ‘be limited to the place of manufacture of the goods : that the ‘place of business might for the purposes of all jurisdiction, properly be deemed the domicil : that the Company could not have ‘the benefit of its place of business here without yielding to the ‘persons with whom it dealt a corresponding advantage : and that ‘virtually they were nobody unless represented by the seller.’ The Company further had given notice to have the injunction granted against them by the court below discharged, *or* that they might have leave to proceed in the Scotch suit. Lord St. Leonards considered that this was a submission to the jurisdiction of the English court from which they could not withdraw, and which would compel them to obey its injunction.

The result of this decision of the majority of the Lords is therefore that the issue of an injunction against a foreign company is *brutum fulmen*, unless the person to whom it could be issued, were the Company an English one, is resident within the jurisdiction.

The responsible person must be within the jurisdiction.

Finally, as to the remedy for disobedience to the injunction : if the party to whom it was issued remain in, or having left, return to the jurisdiction, the remedy is in the hands of the court, proceeding for contempt : if, having left it altogether, ‘he continue ‘contumacious and ultimately obtain judgment in the other ‘country, it will protect the other party from the consequences of ‘that judgment.’ (Sir J. Leach, V.-C. *Bushby v. Munday*.)

*Bushby v. Munday.*  
5 Mad : 297.

But the question naturally arises, will the injunction, issued to the party personally, be recognised by the foreign court so as to induce it to suspend the suit proceeding before it ?

Recognition of injunction by foreign court.

So far as we have been able to gather, this point has never been discussed either at home or abroad. But the argument as to personal jurisdiction upon which the principles rest being sound, the conclusion is obvious that an English court would recognise a foreign injunction, a foreign court would recognise an English injunction ; this being another instance of the principle of the recognition of *jus* for *jus*.

As to service of the writ out of the jurisdiction when an injunction is sought to restrain the doing of anything within the jurisdiction under Order XI., Rule 1 (f). See p. 151.

Service of writ out of jurisdiction when injunction is sought here.

Evidence for  
foreign  
courts.  
19 & 20 V.  
c. 113.

The Statute 19 & 20 Vic: c. 113, empowers the English courts to assist foreign tribunals desirous of obtaining testimony in relation to civil and commercial matters pending abroad, and provides for taking the evidence required in Her Majesty's dominions, when an application is made to them for this purpose.

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Scotch cases.

The following extracts from the judgments in the first Division of the Court of Session in *Young v. Barclay*, indicate the accordance between the Scotch and English procedure.

*Young v.  
Barclay.*  
8 Bell &  
Mur: N. S.  
744.

*Ld: Jeffrey.*

*Lord Jeffrey*:—‘ In England these cases are of frequent occurrence : With respect to the plea of *lis alibi*, I am not satisfied that it is inapplicable even with regard to proceedings in a foreign court. But supposing it is not technically and strictly applicable, as between two suits in different countries, yet here there are grounds of justice and expediency sufficient to satisfy me that we pronounce a wholesome judgment in granting interdict. (The domicile was mixed Canadian and Scotch, but the most important parol evidence was obtainable in Scotland.) Even if the decree we pronounce shall not have the full force of *res judicata*, but be examinable in Canada, after we have pronounced it, it must just be examined. In the meantime, let parties proceed regularly here until our decree is obtained, and let them abstain from insisting simultaneously in twofold procedure. We do our duty in interdicting double procedure *ad interim*, and thereby preventing the immediate emergence of an unjust and oppressive course of action ; and when our decree, as ultimately pronounced, shall be carried to Canada, it will there receive the full effect due to it, in any proceedings which may there take place.’ Lords Mackenzie and Fullerton expressed the same views.

*Ld: President.*

*Lord President Boyle*:—‘ The issue was fully and fairly joined in the court selected by the pursuers of the declarator themselves, affecting the rights to the whole moveable succession wherever situated. After all this, the pursuers commence proceedings in the Canadian courts, raising the same question as to domicile for the purpose of taking up that part of the moveable succession situated in Canada. I apprehend, in these circumstances the defenders were entitled to apply to this court to restrain the pursuers from these latter proceedings pending the declarator here : otherwise, the same investigation into the same matter of fact, would be proceeding at twofold expense, in both courts at the same time.’

*cf: also Phosphate Sewage Co: v. Mollison* (Sc: Ses: ca: 4th Ser: I. 840).

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SUMMARY OF THE SECOND CHAPTER.

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And in the second place into 'single' and 'concurrent' jurisdiction. 62

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Jurisdiction in respect of residence enabling the court to summon a person by civil process, and the right to bring an action not even depending on residence, it follows that there may be two or more suits for the same cause in different countries. 63

Equity has therefore interposed to protect the defendant from this double vexation. 64

The foundation of this jurisdiction is the fact that the party restrained is within the power of the court. 64

The division of the subject and the results arrived at are as follow :—

- i. An injunction to restrain a foreign suit will, under certain circumstances, be granted, although there is no suit pending in England ; 65  
and conversely :

An injunction to restrain an English suit will, under special circumstances, be granted although there is no suit pending abroad. 67

- ii. An injunction will be granted to restrain an English suit commenced after decree abroad : 68

And presumably also, to restrain a suit against a company abroad after a foreign order to wind it up ; 69  
and conversely :



- v. An injunction will be granted to restrain a foreign suit commenced after decree in England. 81  
 examples in administration suits. 81  
 and in winding up companies. 82  
 and in bankruptcy proceedings. 83

- iii. A suit commenced in England pending proceedings abroad will be restrained by injunction, or barred by a plea of *lis alibi pendens* : 69

or in certain cases the plaintiff will be put to his election as to which suit he will proceed with. 70

The principle of *lis alibi pendens* is applicable when the foreign suit is brought by the defendant to the English suit. 74

and conversely :

- iv. A suit commenced abroad pending proceedings in England will be restrained by injunction. 75  
 the court imposing terms if it thinks fit : 75  
 and providing, when necessary, for the foreign suit continuing for certain specified purposes. 77  
 also providing for the costs of the suspended suit. 72

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Two recent decisions of the Court of Appeal discussed. 78

An action *in rem* may be pleaded to, or be the ground for an injunction against an action *in personam* for the same cause ; and *vice versa*. 75. 87

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#### In Administration

the decree is a judgment for all creditors within the jurisdiction, whether absolutely or merely constructively by the fact of their suing. 82

#### In Winding Up

all actions commenced in England prior to, or during the proceedings, will be stayed. 82



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the colonial courts have adopted the same principle, and will assist the winding up by staying actions brought in the colonies. 83

**In Bankruptcy**

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A difficulty arises when the foreign debt is proved and the creditor is not within the jurisdiction. 85

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## CHAPTER III.

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## PROOF OF FOREIGN JUDGMENTS.

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Proof of  
foreign  
judgment in  
England and  
Ireland.

THE seventh section of the Act to amend the Law of Evidence, 1851, [14 and 15 Vic: c. 99, otherwise called Lord Brougham’s Act (No. 2)], provides the method in which foreign judgments are to be proved when they are brought before English or Irish Courts.

14 & 15 V.  
c. 99 s. 19.  
‘British  
Colony.’

The words ‘British Colony’ in this act apply to the Islands of Guernsey, Jersey, Alderney, Sark, and Man, and to all other possessions of the British Crown, wheresoever and whatsoever [s. 19]; but not to British India [Stat: Law Rev: Act, 1875].

*14 & 15 Vic: c. 99, s. 7.*

s. 7.  
Sealed copy  
of the judg-  
ment to be  
received.

*All proclamations, treaties, and other acts of state of any foreign state or of any British colony, and all judgments, decrees, orders, and other judicial proceedings (a) of any Court of Justice in any foreign state or in any British colony, and all affidavits, pleadings, and other legal documents filed or deposited in any such Court, may be proved in any Court of Justice, or before any person having by law or by consent of parties authority to hear, receive, and examine evidence, either by examined copies or by copies authenticated as hereinafter mentioned; that is to say, if the document sought to be proved to be a proclamation, treaty, or other act of state (B), the authenticated copy to be admissible in evidence must purport to be sealed with the seal of the foreign state or British colony to which the original document belongs; and if the*

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document sought to be proved be a judgment, decree, order, or other judicial proceeding of any foreign or colonial Court, or an affidavit, pleading, or other legal document filed or deposited in any such Court, the authenticated copy to be admissible in evidence must purport either to be sealed either with the seal of the foreign or colonial Court to which the original document belongs (γ) or, in the event of such Court having no seal, to be signed by the Judge (δ), or, if there be more than one Judge, by any one of the Judges of the said Court; and such Judge shall attach to his signature a statement in writing on the said copy that the Court whereof he is Judge has no seal; but if any of the aforesaid authenticated copies shall purport to be sealed or signed as hereinbefore respectively directed, the same shall respectively be admitted in evidence in every case in which the original document could have been received in evidence, without any proof of the seal where a seal is necessary, or of the signature, or of the truth of the statement attached thereto, where such signature and statement are necessary, or of the judicial character of the person appearing to have made such signature and statement.

Signature of  
Judge where  
no seal.

[and every such copy shall be *prima-facie* evidence of the original thereof in like manner as if such original were produced and proved in due course of law.

*Addition to the section in the Victorian Statute—27 Vic : c. 197, s. 20].*

(a). An *ex parte* order of a foreign court on a shareholder to contribute to the assets of an insolvent company has been held to be within the words of the section, 'order or other judicial proceeding' (*Leishman v. Cochrane*).

'Judicial  
proceeding.'

*Leishman v.  
Cochrane*, 12  
W. R. 181.

(β). An official copy of a Belgian patent sealed with the Belgian seal was admitted as an 'act of state,' without proof of its being an examined copy or proof of the seal (*ex parte Betts*).

'Act of  
State.'

*exp: Betts*,  
11 W. R.  
221.

(γ). The copy of the judgment itself should be authorised under seal, and not a copy certified as correct by a clerk, although his signature and authority are verified under the hand of the Judge and seal of the court (*Pool v. Hill*.—New Brunswick): The same principle is expressed in *Woodruffe v. Walling* [Upper Canada].

'Authenti-  
cated copy.'

*Pool v. Hill*,  
2 Kerr 184.  
*Woodruffe  
v. Walling*,  
12 Q. B. 501.

(δ). It will always be presumed that the court has a seal, but where it does not possess one, the Judge's book containing the judgment should be produced: and his handwriting and signature should be proved (*Kerby v. Elliott*.—Upper Canada). [See also a case before the Statute—*Alves v. Bunbury*:—'Distinct evidence should be given that the court has no seal, and verifies its judgments by the signature of the Judge, or in any other manner.'] But the seal which is in ordinary use by the court from which the judgment comes is sufficient, even if, on the face of it, it purports to be the seal of another court: proof of course being required that the seal is so ordinarily used. (*Cyr v. Sanfaçon*.—New Brunswick. *Junkin v. Davis*.—Upper Canada.)

Seal of court  
or signature  
of Judge.

*Kerby v.  
Elliott*, 13  
Q. B. 367.  
*Alves v.  
Bunbury*,  
4 Camp : 28.

*Cyr v.  
Sanfaçon*,  
2 Allen 641.  
*Junkin v.  
Davis*,  
6 C. P. 403.

Where seal worn.

If the seal be so worn as no longer to make an impression, it must nevertheless be used (*Cavan v. Stewart*), proof being given that it is in fact the seal of the court.

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Where several documents.

Where there are many documents to be certified to it is not necessary to have a separate certificate for each, a general certificate being sufficient. (*R. v. Wright*—New Brunswick.)

*Cavan v. Stewart.*  
1 Stark : 525.

*R. v. Wright.*  
1 P. & B.  
363.

ss. 9, 10. Documents admissible in the same degree in England, Wales and Ireland.

Section 9 :—documents admissible in England or Wales without proof of the seal or stamp or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same, are to be equally admissible in Ireland.

Section 10 :—the same as to documents admissible in Ireland, to be equally admissible in England and Wales.

Section 11 :—the same as to documents admissible in England, Wales or Ireland, to be equally admissible in the British colonies.

#### 14 & 15 Vic : c. 99, s. 11.

s. 11. Documents admissible in the same degree in the Colonies as in England, Wales or Ireland.

Every document which by any law now in force or hereafter to be in force is or shall be admissible in evidence of any particular in any Court of Justice in England or Wales or Ireland without proof of the seal or stamp or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same, shall be admitted in evidence to the same extent and for the same purposes in any Court of Justice of any of the British colonies, or before any person having in any of such colonies by law or by consent of parties authority to hear, receive, and examine evidence, without proof of the seal or stamp or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same.

Act does not apply to Scotland.

Lord Brougham's Act does not apply to Scotland. The method of proving foreign judgments before the Court of Session is explained in Dickson's Treatise on the Law of Evidence in Scotland, § 1283 *et seq.*

Proof of foreign judgments in Scotland.

The records are admissible in evidence if they are prepared and authenticated according to the law of the country whence they proceed : but they will be rejected if they are not formal according to that law.

This statute having been introduced either entirely or in part into the Statute Books of many of the colonies, the following list may be found useful for reference.

## COLONIAL STATUTES.

[In this list the first section mentioned corresponds with section 7 of the English Act ; the second with section 11.] Colonial Statutes.

Bermuda.	No: 3 of 1853.	s. 7.	s. 8.
Ceylon.	„ 9 „ 1852.	s. 8.	s. 1.
Hong-Kong.	„ 3 „ 1852.	s. 5.	
India.	„ 1 „ 1872.	s. 77.	s. 82.
Jamaica.	20 Vic: c. 19.	s. 5.	
Mauritius.	English Act in force.		
New Brunswick.	19 Vic: c. 41.	s. 5.	s. 6.
Newfoundland.	Consol: Stats: c. 23.	s. 12.	s. 13.
New South Wales.	16 Vic: No: 14.	s. 7.	
New Zealand.	'The English Acts Act, 1854.' s. 7. s. 11		
Nova Scotia.	Revised Stats: c. 96.	s. 27.	s. 28.
Prince Edward Island.	16 Vic: c. 12.	s. 3.	
Queensland.	16 Vic: c. 14.	s. 7.	
Saint Vincent.	Act No: 99.	cl: 7.	
South Australia.	No: 2 of 1852.	s. 5.	s. 9.
Tobago.	„ 14 „ 1869.	s. 7.	s. 11.
Trinidad.	English Act in force. (No: 12 of 1855.)		
Victoria.	27 Vic: 197.	s. 20.	s. 31.
Western Australia.	16 Vic: 9.	s. 7.	s. 8.

In the Statutes of Upper Canada, 13 & 14 Vic: c. 19 contains a provision similar to section 7 respecting judgments and decrees in Law, Equity or Bankruptcy, but it is restricted in its operation to England, Scotland, Ireland, Quebec or Ontario, and the United States ; 43 Vic: c. 7 extends the principle to judgments of any of Her Majesty's dominions.

Section 7 also appears in substance in the Civil Code of Lower Canada, s. 1220 ; and in the Civil Code of Saint Lucia, s. 1152.

## CHAPTER IV.

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IV.

## DEFENCES TO THE ACTION.

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An extended examination of the theory necessary for a complete understanding of the question of defence.

SOME apology is perhaps needed for what has been considered the unnecessary length to which the chapter dealing with the theory of the subject has been carried. The reason for this length has been more than once insisted on, and during the course of this chapter the necessity for it will become more apparent, for until that theory and every part of it has a solid foundation in strict jurisprudence, it is absolutely impossible to deal scientifically with any defence raised; without that foundation confusion of principle and conflict of decision must inevitably ensue.

It is still necessary to speak of the action on the foreign judgment.

It is necessary of course still to speak of the action on the foreign judgment, although, as was pointed out, difficulties have arisen from treating the judgment as an ordinary cause of action. Strictly speaking, the foreign judgment is brought to the English tribunal to be clothed with an auxiliary decree enabling it to be enforced in this country—this will appear more clearly when we come to deal with the effect of foreign probates—and the action is brought to obtain this auxiliary decree. We now propose to consider what defences may be set up by the defendant in such an action.

Statement of the question of defence.

The court abroad, of competent jurisdiction, having adjudicated a certain sum to be due, a legal obligation has arisen in the foreign country, the obligation being to pay that sum. But whilst the courts of one nation willingly lend their assistance to successful suitors in actions decided by the courts of another nation, and in theory at least pay that deference which is due to jurisdictions co-equal in rank with themselves, it seems always to have been assumed that they must of necessity pay some attention to the defence raised by the other party to the action; and the difficulty always present in an action upon a foreign judgment is, how extensive shall be the enquiry suggested as requisite by this defence:—how far the plaintiff's claim may be tested in the interests of justice, without seeming to derogate from the high authority of the court that has pronounced judgment in his favour.

The main principle of defence depends on considerations of public law.

This necessity depends, as we have said, mainly on considerations of public law. In the absence of codification or express enactment on the subject, this principle does not seem ever to have been enunciated in England, although it has received abundant recognition in the majority of foreign codes. Thus in the Italian Code of Civil Procedure, s. 941 (iv.):—‘The court examines the decision to see that its judgment does not contain provisions which are contrary to public order, or to the internal

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'laws of the kingdom.' [See p. 479.] But even in the foreign codes this rule never stands alone, it being always coupled with other defences resembling more or less those which have been raised in our own courts. It will be found however that such as may with certainty be said to be established in English law are all of them properly comprised within this rule of protection to the domestic public law.

We have on many occasions adverted to the fundamental principle that the English court does not sit as a Court of Appeal from the foreign court. Before considering the principle of defence it will be convenient to examine this doctrine thoroughly.

The English court does not sit as an Appeal Court from the foreign court.

*Castrique v. Behrens.*  
30 L. J:  
Q. B. 163.

We have already noticed the case of *Castrique v. Behrens* which lays the foundation of the principle. The English court declined to entertain a suit for maliciously and without reasonable and probable cause setting the law of France in motion, because the question necessarily depended on the assumption that the un-reversed decision of a court in a foreign country was come to without reasonable and probable cause. [See p. 53.] The question may be viewed also by the light of general principles.

The assistance of the English court has been invoked to clothe the legal obligation which has arisen abroad upon the judgment of the foreign court, with the auxiliary international sanction which is resident in the English Sovereign Authority. It is evident that it cannot go beyond the power it is requested to assume, and which assumption is ratified by International Comity, and constitute itself a Court of Appeal by rehearing the merits of the case upon which the foreign court has already adjudicated. The principle therefore flows directly from the doctrine of 'Comity': were the doctrine of 'Obligation' the governing principle, were the foreign judgment no more than an ordinary debt or cause of action, there would be no necessity for a recognition of such a principle.

Principle considered theoretically.

Indeed the principle has of late years found frequent expression in the considered judgments of the courts, and has been expressly recognised both by the House of Lords and the Privy Council. Thus Cockburn, C.J., in *Dent v. Smith*:—'We are not to sit here as a Court of Appeal against any judgment pronounced by a court which must be taken to be one of competent jurisdiction in the administration of Russian Law. The proper tribunal to appeal to, if there was any ground for appeal, was to the Court of St. Petersburg. There is no appeal here.' Martin, B., in *Castrique v. Imrie*, puts the point very concisely:—'Erroneous

*Dent v. Smith.*  
L. R. 4  
Q. B. 414

Judgments in which this rule has been approved.

*Castrique v. Imrie.*  
30 L. J:  
C. P. 177.

'judgments are not void.' Blackburn, J., in the same case delivering the opinion of the judges to the House of Lords:—'In truth the plaintiff asks an English court to sit as a Court of Appeal 'from the French court, which is not the province of the English 'court;' and Sir Robert Phillimore, delivering the judgment of the Privy Council in *Messina v. Petrocchino*:—'The questions that have been raised 'would have been properly raised on 'appeal to the Greek Appellate Court whether sitting at Athens 'or elsewhere; but could not properly be discussed either before 'the court at Malta or before this tribunal.'

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*Castrigue v. Inrie.*  
(H. L.)  
L. R. 4  
H. L. 414.  
*Messina v. Petrocchino.*  
L. R. 4  
P. C. 144.

Attempt to  
raise a  
defence not  
raised  
abroad.

But it may be that the rule of the foreign country is the same as in England, that new defences do not constitute grounds of appeal: and an endeavour may be made to raise a defence in the action on the judgment, which from some cause was not raised in the foreign suit, and so would not be admissible on the appeal abroad. It is evident that the doctrine of appeal includes this case. If the new defence had been raised in the foreign appeal court it would have been rejected. To allow it to be raised in England would virtually be receiving it by way of appeal, and would be going behind the foreign rule. Such a defence therefore will not be admitted. (*Doglioni v. Crispin. Vanquelin v. Bouard.*)

*Doglioni v. Crispin.*  
L. R. 1 E. &  
1. 301.  
*Vanquelin v. Bouard.*  
33 L. J:  
C. P. 78.

'When a party having a defence omits to avail himself of it, or, 'having relied upon it, it is determined against him, and a judgment is thereupon given, he is not allowed afterwards to set up 'such matter of defence as an answer to the judgment, which is 'considered final and conclusive between the parties' (Bovill, C.J., *Ellis v. McHenry*).

*Ellis v. McHenry.*  
L. R. 6 C. P  
228.

'The error alleged to exist in this judgment could have been 'corrected by proper proceedings abroad.' (*Milne v. Van Buskirk*—Iowa.)

*Milne v. Van Buskirk.*  
9 Ia: Rep:  
558.

Colonial  
judgments.

With regard to Colonial judgments this principle is still clearer, because the Privy Council is the appellate tribunal for the British Colonies, and in that court alone can matters which are legitimate grounds of appeal be entertained. (*Henderson v. Henderson.*)

*Henderson v. Henderson.*  
3 Hare 100.

The doctrine  
of appeal  
stated.

There is therefore abundant authority for this principle of appeal which may be thus enunciated: In an action on a foreign judgment the English court will not entertain any matter which should have been raised by way of defence to the foreign suit, or which, being properly a ground of appeal, is cognisable only by the appellate tribunals of the country in which the judgment was pronounced.

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Too much importance cannot be attached to the necessity for an universal recognition of this principle. It has been authoritatively expounded by the highest courts, but its full bearing seems often to have been overlooked, as we shall have occasion to point out. It is in truth the key to the whole question, making clear many things of themselves hard to be understood. It is bottomed in the simplest of ideas, that a court may properly be called 'of justice' in whatever country it may be situated. To refuse to adopt it is tantamount to declaring that justice is exclusively resident in these islands, much in the same way as the state of Texas in 1841 declared that 'this Republic is not bound by any international law or comity to give credence or validity to the adjudication of foreign tribunals whose measures of justice and rules of decision are variant and unknown here.'

Importance  
of this  
doctrine.

The tribunals of all nations must in their several degrees be considered equal in their dignity and in their powers of administering justice:—'The courts in this country have no right, praising themselves to say, we will administer the law better and do more justice than the other court will. Courts must respect each other.' (James, L.J., *Fletcher v. Rodgers*.) We cannot 'assume that the court in San Francisco is unable or unwilling to administer justice.' (Brett, M.R., *Hyman v. Helm*.)

All courts  
must be  
considered  
capable of  
administer-  
ing justice.

*Fletcher v.  
Rodgers.*  
27 W. R. 97.

*Hyman v.  
Helm.*  
24 Ch: D.  
531.

The French courts have extended the principle to what is in fact its legitimate conclusion, by deciding that the suit for *exequatur* on a foreign judgment must be taken in France before a court of equal degree with the foreign court whose judgment it is (*Anon.*).

French rule.

*Anon.*  
J. D. I. P.  
1877, p. 234.

Combining this principle of appeal with that of public law, the general rule of defence would seem capable of being easily formulated. The defence in an action on a foreign judgment must be such as would be a defence to an action on the judgment in the country where it was pronounced; or must rest on the ground that the enforcement of the judgment would involve a violation of English public law.

General  
rule of  
defence.

*Frith v.  
Wollaston.*  
21 L. J.  
Ex: 108.

The first part of this rule was expressly recognised by Parke, B., in *Frith v. Wollaston*:—'Any defence in the country where the judgment was obtained would be equally available as such in this country.'

We have said that the doctrine of 'Obligation and Comity' involved the power of formulating a principle of defence capable of sharp definition, and it may be objected that the term 'violation of public law' is the reverse of a scientific



Lord Black-  
burn's rule  
of defence,

expression : practically it will be found easy of application. Again it may be objected that we have put forward as the model rule of defence that enunciated by Lord Blackburn in *Godard v. Gray*, when he adopted Baron Parke's dictum, which has been called the doctrine of 'Obligation.' That rule is thus expressed : — 'It follows that anything which negatives the existence of the 'legal obligation, or excuses the performance of it, must form a 'good defence to the action.'

*Godard v.*  
*Gray.*  
L. R. 6  
Q. B. 139.

examined.

Rightly understood, this rule includes the one we have enunciated above : but although, on the face of it, it is very precise, in reality it is capable of infinite extension, for it does not exclude defences which are undeniably bad. For example : The foreign court has made a mistake in its application of English law. Surely it is not illogical to argue before an English court, called upon to recognise the existence of the foreign obligation, that such an error should sufficiently excuse the performance of it in this country, even if it did not negative its existence.

The consciousness of this dilemma, and a natural unwillingness to disregard a principle which had so much weight of authority in its favour, led us in the first edition [p. 100] to formulate a modification of this rule of defence : thus—'a defence is good if 'it negatives or excuses, *so long as* the English court does not, in 'entertaining it, become an appeal court.' We have already pointed out what we venture to think are the radical errors contained in the main doctrine from which the rule springs ; but the rule itself has this peculiarity that, although it is a direct inference from, it does not perpetuate the errors involved in, the parent doctrine ; for as we have seen it might, if sound, equally be stated as a logical inference from the doctrine of 'Obligation and Comity.'

The use of  
'anything'  
seems fatal  
to its  
accuracy.

But, with the greatest submission to its learned author, it seems to us to contain in itself an error fatal to its utility : this is the use of the word 'anything ;' which, as the example just cited serves to illustrate, extends its application indefinitely.

The rule of  
defence  
stated in  
another  
form.

But if this application be limited, as we think it should be, so as to include only two principles, that of appeal and that of public law, the most important features of the definition remain while its objectionable one disappears : and the rule given above may be stated in another form thus : Whatever is a defence to the judgment in the country of its origin, will, in this country, negative the existence of the obligation : If the enforcement of the judgment would involve a violation of English public law, that will excuse the performance of the obligation in this country. This rule will



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be found to include all the established defences. It may be said, however, that this introduces an element of uncertainty, and involves an objectionable incorporation of foreign into English law. But the uncertainty does not in reality exist, for the main defences to an action on a domestic judgment must really be common to all countries. And with regard to the incorporation and interpretation of foreign law, that is a duty which our courts are almost daily called upon to perform. This rule of defence is therefore put forward with some degree of confidence.

This chapter has been entitled for convenience, 'Defences to the 'Action.' The main principles are, as we have pointed out, equally applicable to the plaintiff's reply when the defendant pleads a foreign judgment in bar.

The rule of defence applies to plaintiff's reply. [cf. p. 41.]

We propose first to dispose of those defences which may be said to be common to all countries in actions on judgments.

Defences common to all countries.

NUL TIEL RECORD.

It is convenient to preserve this phrase, although in name the old plea has disappeared.

The old plea *nul tiel record*.

It will appear from what has been advanced in the first chapter, that, as in the case of an English judgment the opposite party may put the existence of the record itself in issue or may deny the effect of it as stated in the pleadings, so in the case of a foreign judgment, the non-existence of the judgment may be set up, or its effect as stated by the opposite party may be denied ; as for example its equivalent in English money.

It was held however in *Walker v. Witter* and *Philpot v. Adams*, that the old plea *nul tiel record* was bad in an action on a foreign judgment ; but these decisions proceeded on the ground, which we have already had occasion to notice, that a foreign judgment was not equivalent to, and was not properly called, a record. But although technical pleas have been abolished, it is evident that the defendant will still be entitled in his statement of defence to deny the existence of the judgment, thereby putting the plaintiff to strict proof under 14 & 15 Vic: c. 99. s. 7. [See chapter iii.]

*Walker v. Witter*,  
1 Dougl: 1.  
*Philpot v. Adams*,  
31 L. J:  
Ex: 421.

RELEASE AND SATISFACTION.

Under this head it is perhaps only necessary to point out that the case of satisfaction already noticed [p. 42], was where, in an

Release and satisfaction.

action on the original cause of action, satisfaction of a foreign judgment on that cause was pleaded: in this case it is pleaded in an action on the judgment itself, and when proved constitutes of course a complete defence.

Partial.

It follows also that partial satisfaction, or partial release, is a good defence to so much of the judgment as has been satisfied or released. (*Rangely v. Webster*—New Hampshire.)

Absolute  
discharge by  
law.

Similarly of course an absolute discharge from the liability by the law of the foreign country must be an absolute discharge here: see the case of *Gould v. Webb*, cited on p. 144: and the discussion under the head of Statutes of Prescription [p. 200]: but this is not so where the remedy only is taken away, as by a Statute of Limitation. [See p. 198.]

*Rangely v. Webster.*  
11 N. H.  
Rep: 299.  
*Gould v. Webb.*  
24 L. J:  
Q. B. 205.

These two defences are really all that can be raised in an action on a domestic judgment.

We may now proceed to more debateable ground, and consider one by one the many forms which the defence to the action on the foreign judgment has assumed: the three great divisions of the subject being Fraud: Error: Jurisdiction; the three minor divisions being Natural Justice: International Law: Public Law.

## I. FRAUD.

Fraud.

It is said that the conduct either of the parties to the foreign suit, or of the foreign court itself, may be reviewed by the English court on the ground of fraud: we will therefore consider these two questions separately.

### (a.) *Fraud of the parties.*

Of parties.

A rough general principle is to be found in many judgments which may be stated as follows:—

If the conduct of either party has been fraudulent, if he has irregularly and unduly obtained the judgment he is seeking to enforce or to have recognised; that undoubtedly, the other party proving it, will be sufficient to excuse his performance of the obligation; unless indeed he has himself been a party to the fraud: *Nemo allegans suam turpitudinem est audiendus*. (*Tebbetts v. Tilton. Adams v. Adams*—New Hampshire.)

*Tebbetts v. Tilton.*  
31 N. H.  
Rep: 273.  
*Adams v. Adams.*  
51 id: 388.  
*Bowles v. Orr.*  
1 V. & C:  
Ex: 464.

Upon this point (although Lord Lyndhurst, C., did not put the case very strongly in *Bowles v. Orr*, when he said, 'Perhaps it

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‘might be said that, on showing a strong case, the party might ‘defeat the judgment even at law’) there would appear to be no conflict of authority, as will be seen on reference to the following cases, which, treating the matter generally, consider it requires no argument to support it :—

<sup>1</sup> 26 L. J.

Ch: 196.

<sup>2</sup> 20 L. J.

Q. B. 284.

<sup>3</sup> L. R. 4.

P. C. 144.

<sup>4</sup> 1 Y. & C.

Ex: 464.

<sup>5</sup> 30 L. J.

C. P. 177.

<sup>6</sup> L. R. 8.

Ch: 695.

*Reimers v. Druce* <sup>1</sup>*Bank of Australasia v. Nias* <sup>2</sup>*Messina v. Petrocchino* <sup>3</sup>*Bowles v. Orr* <sup>4</sup>*Castrique v. Imrie* <sup>5</sup>*Ochsenbein v. Papelier* <sup>6</sup>

and many others; it would be impossible, so numerous are they, to refer to every decision or every judgment in which the Judge has expressed his concurrence with the general principle. In every attempt at a classification of defences that has been made, however imperfect, the fraud of the plaintiff as a sufficient excuse, has always been prominently put forward. But it must be remembered that fraud has not necessarily been involved in the decision of all the cases in which it is referred to. Judges, when they have been called upon to decide any point arising on the question of foreign judgments, have invariably thought it necessary to include the whole subject in their remarks, and amongst other things to give a list of defences, which has not always been accurate, and seldom exhaustive. As we study the defences *seriatim*, the inconvenience arising from this becomes very marked.

But fraud has not been involved in all these decisions.

*Godard v.**Gray.*

L. R. 6

Q. B. 139.

In *Godard v. Gray* however there is a hesitation to admit the proposition with regard to fraud. Blackburn, J., in giving a careful classification of defences, says, ‘*probably* the defendant ‘may shew that the judgment was obtained by the fraud of the ‘plaintiff.’ But Lord Selborne, C., in *Ochsenbein v. Papelier* declared that these words ‘were not intended to throw any doubt ‘upon so clear a matter.’

*Blackburn, J.*, appears to have hesitated in accepting the proposition.

*Ochsenbein**v. Papelier.*

L. R. 8

Ch: 695.

*Duchess of**Kingston's**case.*

2 Sm: L. C.

770.

The discussion on the question is usually preluded by a reference to Chief Justice De Grey's well-known dictum in the *Duchess of Kingston's case*:—‘Fraud is an extrinsic collateral act; which ‘vitiate the most solemn proceedings of courts of justice. Lord ‘Coke says it avoids all judicial acts, ecclesiastical or temporal.’ It is then continued, as we see in Lord Selborne's judgment just referred to, as if nothing could be said on the other side. Attempts have however been occasionally made to reduce the principle, so far as it relates to foreign judgments, into something less vague, something more capable of direct application.

*De Grey, C.J.*

Attempts to enunciate a definite principle.

This fraud must be fraud in procuring the judgment, such as collusion or the like: it cannot be set up that the defence to the suit was fraudulent. (Martin, B., *Cammell v. Sewell*.)

The fraud must be on the part of the person relying on the judgment alone. (Brett, L.J., *Abouloff v. Oppenheimer*.)

Fraud may be shown where it may be done without showing any participation in the fraud, and where it does not involve a re-examination of the merits of the case: but

Where the fact of fraud is involved in the issue, such fraud constitutes no ground for impeaching the judgment. (*Tebbetts v. Tilton*—New Hampshire.)

If the fraud ought to have been tried in the original action, it cannot be set up, even although it was unknown and undiscovered at the time of the trial. (*Adams v. Adams*—New Hampshire.)

These scattered principles may be reduced into some such formula as the following:—If the fraud alleged is such that it would constitute a ground of appeal in the country in which the judgment was pronounced, the English court ought not to consider it.

We must now consider the few cases in which fraud has been expressly considered.

Recent decision of C. A. considered.

The most recent and perhaps the most important one, by reason of its lengthy discussion in the Court of Appeal, is *Abouloff v. Oppenheimer*:—The action was brought on a judgment of the District Court of Tiflis in Russia, ordering the return of certain goods, or in lieu thereof the payment of their value: this judgment had been upheld on appeal by the High Court of Tiflis. One of the paragraphs of the statement of defence alleged that the judgments had been obtained by fraud, which was thus specified: the plaintiffs had fraudulently represented to the courts that the goods were not (as it was alleged they were) in their own possession at the time of the suit and judgments, and had fraudulently concealed from the courts that the goods were in their possession, except some of them, which had been secretly and fraudulently disposed of by them. To this paragraph the plaintiffs demurred.

The demurrer was overruled by the Divisional Court [Mathew and Cave, JJ.] and this decision was upheld by the Court of Appeal [Lord Coleridge, C.J., Baggallay and Brett, LL.J.]. The plaintiff's argument was that the fraud alleged must have been before the Russian court: that it was a fact which that court could have examined and did examine: and that the going into

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*Cammell v. Sewell*.  
27 L. J.  
Ex: 447.  
*Abouloff v. Oppenheimer*.  
10 Q. B. D.  
295.

*Tebbetts v. Tilton*.  
31 N. H.  
Rep: 273.

*Adams v. Adams*.  
51 N. H.  
Rep: 388.

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*Abouloff*  
v. *Oppen-*  
*heimer*.  
10 Q. B. D.  
295.

*Cammell v.*  
*Sewell*.  
27 L. J.  
Ex : 447.

it again by the English court would amount to a new trial of the case on its merits. This was paraphrased by Lord Coleridge in the following manner :—‘ Although it must be taken up on the ‘pleadings that the court of Tiflis was led to its conclusion by ‘believing the false statement made on behalf of the plaintiff, the ‘defendants, who had judgment obtained against them by that ‘false statement, are not at liberty here to say it was false.’ The learned Chief Justice declared ‘that would be a monstrous state ‘of the law if it could be maintained ;’ and, starting from Chief Justice De Grey’s dictum given above, expanded and applied the doctrine that ‘no one can take advantage of his own wrong :’ then, taking the first part of Baron Martin’s rule in *Cammell v. Sewell*, together with a sentence immediately preceding the old dictum— ‘although it is not permitted to show that the court was mistaken, ‘it may be shewn that they were misled’—the principle was enunciated as follows :—‘The question for the courts here to ‘consider is whether the foreign court has been misled intention-ally by the person seeking to enforce the judgment, and also ‘whether fraud has been committed by him in order to procure ‘that judgment which was procured thereby.’ It appears that the principle of appeal, which has just been considered, was not put fully to the court, because the Chief Justice considered it in the cause of fraud to be an ingenious analogy to the other cases of error in law, and error on the merits of the case :—‘In examining ‘the question of fraud here, our courts are not discussing any ‘question which could have been determined by the foreign court. ‘That court has been misled, not mistaken ; it is plain that if the ‘court were in the position of having means of knowing, judgment ‘would not have been given in the way it was here.’ Lord Justice Brett adopted the same line of argument :—‘It seems to me, even ‘supposing these allegations were made in the former action, and ‘the defendant gave evidence in support of them, and even gave ‘the same evidence as he brings forward now ; nevertheless the ‘fact of his having made this allegation and produced that evidence ‘does not prevent him bringing the same evidence here and relying ‘upon it, if the court here is satisfied of their truth.’

The court misled, not mistaken, is said to distinguish ‘fraud’ from ‘error.’

It is perhaps bold to question such positive judgments. But it is most necessary to consider the consequences which must result from the decision.

Stated broadly the proposition is this : Fraud may be alleged against a foreign judgment.

Now, the fraud alleged by the pleadings in this case was distinctly



The fraud  
alleged in  
the case was  
perjury.

The result  
is a  
rehearing.

It is doubtful  
whether  
*C. J. De  
Grey's*  
dictum is  
really  
applicable.

Perjury a  
ground of  
appeal  
abroad.

Where fraud  
means  
perjury it  
should not  
be admitted  
as a defence.

specified : it was nothing different from an allegation of perjury. Is it possible to conceive an unsuccessful defendant who will not say that his adversary has perjured himself? Defendants in foreign judgment actions will only be too ready to allege this kind of fraud, and as it has been decided to be a good plea, it will invariably be resorted to, not so much for the purpose of establishing the allegation, but as a convenient method of obtaining a rehearing of the case upon its merits : in other words, the English court will always be invited, under this cloak, to hear the evidence of the parties afresh, and to determine which is the true version of the case.

The broad principle can hardly be questioned : but the application of it in this instance, rendered very clear by the light of the allegations in the statement of defence, seems, with the greatest submission, to strike at the very root of the principle of appeal, which, it cannot be too often insisted upon, is not only the most essential but also the soundest doctrine involved in our subject. The fallacy, if we may use the term with respect, lies in the unhesitating application of Chief Justice De Grey's dictum in a suit concerning the effect and validity of the sentence of an English Spiritual Court, to a suit concerning the effect and validity of the sentence of a foreign court. The doctrine of appeal is clear beyond question, but the point and consequence of that doctrine seems to have been missed. It was said that the question was not whether the Russian court had been mistaken, but whether it had been misled ; and that this could never have been submitted to the court so misled ; therefore that it was never decided by that court ; therefore that the English court was not acting by way of appeal. But surely the fact of which the English court was to take cognisance, that the court at Tiflis had been misled by fraudulent statements, must have been a ground, if not the ground of the appeal to the High Court ; or, if discovered since that appeal, a ground for a still higher appeal : if so, there was the defendant's remedy, and in the former case he had availed himself of it unsuccessfully : thus, in adjudicating upon the alleged fraud, the *English Court of First Instance* would either be criticising the decision or usurping the province of the Russian Appeal Courts.

Beyond saying that fraud may be alleged in the statement of defence (and even this must be taken subject to the remarks to be made shortly), we venture most respectfully to doubt the soundness of this decision on this simple ground, that where fraud is another name for perjury, other well-established principles seem to govern the case.



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The remaining decisions are the following :—

*Blake v. Smith* :—a partnership action. The court, by means of an injunction, set aside a Portuguese judgment which had been obtained by the fraud of one of the partners.

*Blake v. Smith*,  
cit: 8 Sim:  
303.  
*Bowles v. Orr*,  
1 Y. & C:  
Ex: 464.

*Bowles v. Orr* :—a bill having been filed with reference to certain accounts, an application was made for an injunction to restrain an action on a foreign judgment in respect of the same accounts on the ground that it had been obtained by fraud : a demurrer for want of equity was overruled.

*R. v. Wright*,  
1 P. & B.  
363.

*R. v. Wright* [New Brunswick] :—the Court refused to recognise a divorce which had been obtained abroad on a false affidavit.

*Abouloff v. Oppenheimer*,  
10 Q. B. D.  
295.

These three cases do not carry the principle any further than that enunciated in *Abouloff v. Oppenheimer*, the fraud in each case having been in effect perjury in the foreign court. It is doubtful however whether they have ever been followed : see under the head of Injunctions [page 68].

*Crawley v. Isaacs*,  
16 L. T. 529.

In *Crawley v. Isaacs* however we find the Exchequer Chamber acting on a much narrower, and it is conceived more accurate principle. The action was on an Irish judgment ; the plea, that it had been obtained on a false affidavit. The plea was overruled on the ground which we have from the first insisted upon, that alleged perjury is the ground for appeal in the foreign country and is not cognisable by the English court. ‘If this were the case,’ said Bramwell, B., ‘of a judgment obtained by untrue statements contained in an affidavit in a foreign court where the procedure is ‘contrary to natural justice, then we might refuse to give effect to ‘that judgment : but if the procedure be not contrary to natural ‘justice, the defendant has a remedy by an application to the foreign ‘court to get the proceedings set aside : so that in all cases there ‘will be a remedy. If the procedure be in accordance with ‘natural justice the foreign court itself will interfere to prevent the ‘plaintiff taking advantage of the judgment irregularly and im- ‘properly obtained.’

Case in  
Cam: Scacc:  
in which the  
broad rule  
has been  
doubted, and  
held not to  
include  
perjury.

*Cammell v. Sewell*,  
3 H. & N.  
617.

So in *Cammell v. Sewell* it was suggested that the foreign judgment had been obtained by fraud. Cockburn, C.J., said, ‘If the court of Norway has been deceived, the remedy is in that ‘court.’

*Demeritt v. Lyford*,  
27 N. H.  
Rep: 541.

And in *Demeritt v. Lyford* [New Hampshire] Bell, J., applied the same principle in an action on a home judgment :—‘We think it ‘would open quite too wide a door for uncertainty and endless ‘litigation, if it were to be held that, upon a plea that perjury had ‘been committed upon the trial, the merits of every controversy

‘which has passed into a judgment could be reopened and ‘examined.’ Chapter IV.

Here then is a direct recognition and application of the principle of appeal to the defence of fraud, and it seems directly at variance with the doctrine enunciated by the Court of Appeal which we have considered above.

Another case of fraud : apparent jurisdiction conferred by fraud or collusion.

Another case of fraud is suggested by Crompton, J., in *Castrique v. Behrens*; where ‘by the contrivance of the plaintiffs, the proceedings were such that the defendant had no opportunity to appear in the foreign court and dispute the allegations,’ such conduct on the part of the plaintiffs would amount to a good defence to the action. This point is again referred to in *Demeritt v. Lyford* [New Hampshire] :—‘If apparent jurisdiction has been conferred by fraud or collusion, the judgment may be impeached.’

*Castrique v. Behrens*,  
30 L. J.  
Q. B. 163.

*Demeritt v. Lyford*,  
27 N. H.  
Rep: 541.

It is difficult to imagine a practical example not coming within previous rules.

It is difficult to imagine a practical example of this ; in England every step in an action being based on affidavit, even a judgment signed for default of appearance, if obtained by a fraudulent concealment of the defendant’s absence from the jurisdiction, would rest upon a false affidavit and therefore come within one of the two decisions we have already considered. The point however does somewhat resemble that decided in *Frankland v. McGusty*, which was an appeal against a decree pronounced in Demerara in favour of judgments given in St. Vincent in respect of considerations arising in that island. The judgments in St. Vincent had been confessed on a warrant of attorney, there being no such power. The decree was reversed. But it would seem to be distinguishable from *Luckenbach v. Anderson* [Pennsylvania] where the judgment had been confessed, but the plea that the defendant had been fraudulently decoyed into the foreign country for the purpose of suing him was overruled.

*Frankland v. McGusty*,  
1 Kn: P. C.  
274.

*Luckenbach v. Anderson*,  
47 Penn:  
Rep: 123

It is still perjury.

This case of fraud, if it can be distinguished, certainly presents very grave difficulties. The principle of appeal must not, as we have seen in Baron Bramwell’s judgment quoted above, be left out of the discussion ; and whatever the fraud, whether it be perjury at the trial, or perjury the consequence of which is an assumption of jurisdiction, it must certainly form a ground of appeal in the foreign country, and therefore cannot be a defence to the action on the judgment.

Fraud no defence in action on home judgment here.

Moreover fraud is not in this country a recognised defence in an action on a home judgment, but is rather the ground of appeal from it, or for a motion to set it aside immediately the fraud has

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been discovered. And this presumably is the law in all countries. But consistently with what has already been said, if in the country in which the judgment was pronounced, fraud (whatever be its nature) is a defence in an action there on that judgment, then the English court should admit it as a defence in an action on that judgment here.

If it is a defence abroad it should be here on the judgment.

Finally, it may well be doubted whether the dictum of Chief Justice de Grey is even applicable to the subject under discussion : it referred to a sentence of the Spiritual Court against a marriage in a suit for jactitation of marriage : when we come to the question of divorce a new element is introduced which from its nature is inapplicable to other cases, collusion *between the parties* to the suit : we venture with great submission to suggest that this dictum goes no further than saying that a judgment obtained by fraud should be set aside, the question here being which is the competent tribunal to set it aside.

(b.) *Fraud of the Court.*

*Cammell v. Sewell.*  
27 L. J.  
Ex : 447.

In the case of *Cammell v. Sewell* in the Exchequer, Martin, B., said that a foreign judgment would be avoided for fraud, which might be on the part of the plaintiff in procuring the judgment, or on the part of the court itself.

Fraud of the Court.

Although it is difficult to imagine in what this fraud could consist, yet wilful disregard of the English law by which the foreign court ought to have been guided, and which to a certain extent it recognised, is a defence frequently to be met with in the cases.

It is possible also that there may be a defence raised, of a wilful disregard by the court of its own forms of procedure ; of its own law ; or of the merits of the case.

Possibility of wilful disregard of other matters.

Although in the reported cases, a wilful disregard of English law is the only form in which this defence appears, there being no case at present decided, in which a wilful error in any other matter has been raised ; yet it is suggested that the authorities, although referring specifically to the former case, may, without any violation of the principles contained in them, be referred generally to the latter cases ; that is, to a wilful error in facts, law, or procedure. We may therefore group these four under the one head of 'wilful error'—for there does not seem to be any special ground for separating a wilful error in English law, from a wilful disregard of any other important element in the consideration of the case. The ground alleged for the one, is a violation of the general

Authorities as to wilful error in English Law applicable to wilful error generally.

principles of Natural Justice : For the others, the ground can be no less a violation of those principles.

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And first it may be well to clear from the discussion a misconception which is almost certain to arise, by stating what will have to be considered more fully hereafter, that error is not fraud. This was fully recognised by Blackburn, J., in *Castrique v. Imrie*, in which case the opinion of the Attorney-General as to the English law had been put before the foreign court, but had not been acted upon.

*Castrique v. Imrie.*  
L. R. 4  
H. L. 414.

The defence '*wilful error*' generally, will therefore be considered by the aid of the authorities upon the defence '*wilful disregard of English law.*'

Opinion in  
Smith's  
Leading  
Cases.

In Smith's Leading Cases, in the note to the Duchess of Kingston's case [p. 817] there is the following paragraph :—'There is considerable authority for saying, that where a judgment of a foreign court is given in *perverse and wilful* disregard of the law of England when clearly and plainly put before it, though the law governing the case be that of England, it would not be enforced by the tribunals of this country, though the defect be not apparent on the face of the proceedings.'

*Duchess of Kingston's case.*  
2 Sm: L. C. 813.

The authorities are as follows :—

Cockburn,  
C.J.

Cockburn, C.J., in *Castrique v. Imrie* in the Exchequer, discussed the subject, although he forbore giving any express decision upon it ; if the fact were, he said, 'that the French court *knowingly and intentionally* set the English law at naught, thereby violating 'the Comity of Nations (by virtue of which alone the judgments 'of the tribunals of one country are respected by those of another),' some members of the Court were strongly disposed to think that a judgment *in rem* could not be questioned : no opinion being expressed by them about a judgment *in personam* :—but on the other hand, that other members of the Court—'if it could be 'shewn that, in a case in which the effect of a contract was to be 'determined by the *lex loci contractus*, a foreign court *perversely* 'insisted on applying its own law, being in conflict with the 'former, thereby outraging the principles of International Comity 'in a manner amounting, in fact, to a species of judicial misconduct'—were by no means prepared to say that in such a case 'it 'would not be the duty of a court in this country to refuse to 'recognise the binding effect of such a judgment ; not indeed, by 'way of reprisal towards the foreign tribunal, but to protect our 'own fellow-subjects from injustice.'

*Castrique v. Imrie.*  
30 L. J :  
C. P. 177.

Different  
opinions of  
members of  
the Court in  
*Castrique*  
*v. Imrie* in  
the Ex-  
chequer.  
Wilful  
application  
of wrong  
law.

*Dent v. Smith.*  
L. R. 4  
Q. B. 414.

The same learned judge in *Dent v. Smith*, assumed that if

Chapter IV. the suggested error were wilful it would be a good ground of defence.

*Castrique v. Imrie.*  
L. R. 4  
H. L. 414.

*Simpson v. Fogo.*  
32 L. J :  
Ch : 249.

In *Castrique v. Imrie* before the House of Lords, Lord Hatherley said that 'it appeared in this case that the whole of the facts had 'been enquired into judicially, honestly, and with the intention to 'arrive at the right conclusion'; but he avoided expressing any opinion as to what might be done if such were not the case. In *Simpson v. Fogo*, however, when the learned lord was Vice-Chancellor Wood, he said :—' Here is a case of a foreign judgment which 'distinctly states our law, and says that it disregards it, *giving reasons* 'for so doing which are entitled to great weight. I confess I yield 'to those judges constituting the Court in *Castrique v. Imrie*, who 'considered that even in the case of a judgment *in rem*, if there 'were on the face of the judgment a *perverse and deliberate refusal* 'to recognise the law of the country which had conferred the 'property, everything having been rightly done to acquire the 'property, that in such a case it would be the duty of a court to 'refuse to recognise the efficacy of such a judgment.'

The weight of authority is therefore in favour of refusing to acknowledge the foreign judgment where there has been wilful disregard of either law or procedure, such disregard being held to be tantamount to fraud on the part of the court. Result of the cases.

Lord Hatherley's judgment would seem to limit this rule to an 'apparent' wilful error (the distinction between 'apparent' and 'proveable' error will be discussed in the next section of this chapter), but the other cases do not seem to warrant such a limitation, but rather to support the proposition as stated in Smith's *Leading Cases* [*ante*, p. 114].

The difficulty of establishing wilful error must of course be very great. No stronger case could well be imagined than that already noticed in *Castrique v. Imrie*, where the written opinion of Sir Alexander Cockburn, then Attorney-General, was deliberately disregarded : yet when the case came before him as Chief Justice this was not unanimously held to be sufficient to entitle the English court to disregard the judgment. It would seem however that if alleged in the pleadings, the question will be gone into, but it is suggested that the most positive proof of the wilfulness of the error and perversity of the court will be required, lest the English court overstep the limits of their authority and act as a Court of Appeal, and also because the ground on which the plea rests is diametrically opposed to the fundamental principle that one court must presume another court to act well and justly. Difficulty in establishing wilful error.

*Castrique v. Imrie.*  
30 L. J :  
C. P. 177.



Defendant to shew that English law was put before the foreign court; and all the facts.

Further, it is essential that the party setting up this wilful error should shew that, as to an error in English law, the law was clearly and plainly put before, and expounded to the foreign court; and as to any other error, that all the facts were laid before the court; in other words, in accordance with what has already established, that the proof brought to establish the error before the English court is not such as might and ought to have been raised as a defence to the action abroad. The fault lies with the defendant if the whole case, and all the law upon the case, is not before the court; if in this respect he is in the wrong, the foreign court most certainly cannot be said to have erred wilfully and perversely.

If he does not, no wilful error.

Judgment *in rem*.

In the case of a judgment *in rem*, we have however an expression of the opinion of some Judges, that this enquiry could not be permitted.

A division of the subject suggested. Wilful error with wrongful intent;

The following considerations may tend to simplify the matter :—first—the alleged errors may be not merely wilful, but there may be discoverable an intention in the court of doing wrong; as, from enmity with the country to which one of the parties is subject; or from sheer perversity: and secondly,—the alleged errors may be wilful, but yet there may be no intention of doing wrong, but rather the reverse;—as, in cases where there really existed some doubt as to which law ought properly to be applied; or where, as in *Simpson v. Fogo*, reasons are appended, and the court has wilfully made the error in the exercise of its judicial discretion.

With no wrongful intent.

*Simpson v. Fogo*.  
32 L. J.  
Ch: 249.

Example of wilful error in Italian courts.

A remarkable instance of 'sheer perversity' is furnished by the case of *Debenedetti v. Morand*, a decision of the Italian courts in a suit for *exequatur* on a French judgment. The court declared that it would disregard Italian law and adopt French law *jure retorsionis*. [See p. 483.]

*Debenedetti v. Morand*.  
J. D. I. P.  
1879, p. 72.

Defence attacking the integrity of the foreign court.

The defendant may however impeach the *integrity* of the foreign court; as for example, by alleging bribery of the Judges. This point was suggested merely, but not considered by Lord Campbell, C.J., in the *Bank of Australasia v. Nias*. In *Abouloff v. Oppenheimer*, one of the paragraphs of the Statement of Defence alleged bribery of the Judges, and another the well-known (in Russia) impurity of the courts of Tiflis, and the Imperial endeavours to reform them. That is to say, that the foreign court was corrupt and open to bribery, and also that bribes were in fact accepted by it. From the 'Times' report of the decision of the Divisional Court it would appear that both points were argued before it; but it is believed unsuccessfully, for both allegations

Bribery of the judges, and impurity of courts.

*Bk: of Australasia v. Nias*.  
20 L. J.  
Q. B. 284.  
*Abouloff v. Oppenheimer*. 10  
Q. B. D. 295.



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were struck out by the defendant before the case was heard by the Court of Appeal.

*Price v.  
Dewhurst.*  
8 Sim : 279  
—302.

There is one reported case in which the integrity of the foreign court was successfully attacked on the ground of the interest of the Judges in the subject matter of the action : *Nemo debet esse judex in propria causa*. *Price v. Dewhurst*, where the proceedings abroad took place in what is called the Executor's Court of Dealing in St. Croix. According to Danish law, where by a will certain people have been appointed incassators and guardians *for other persons*, they may form themselves into a court for administering the property for the benefit of those persons. But it appeared that in this instance this court had determined questions *for themselves*; and on this ground the integrity of the court was attacked : *not the court itself* on account of its peculiar and unjudicial constitution,—for that was warranted by Danish Law ; and it is presumed that a decision of the court relative to the persons over whom the court had been appointed guardian, would have been acknowledged ;—but the *acts of this peculiar court* ; the act of determining a matter in which the members of the court themselves were interested : (if this course had been warranted by Danish Law, Shadwell, V.-C., thought that the question might have been raised that it was contrary to the common course of Justice). The Vice-Chancellor said :—‘ It would be idle to say that we must pay attention to what took place in this case. ‘ Wherever it is manifest that justice has been disregarded, and ‘ that the parties are merely making use of legal proceedings as ‘ a matter of form, for the purpose of doing that which is contrary ‘ to all notions of justice, viz :—of deciding for themselves, and in ‘ their own favour, the court is bound to treat their decisions as ‘ a matter of no value and no substance. This foreign judgment ‘ is fraudulent and void.’

Example of  
the Exors' :  
Court of  
Dealing, in  
Danish law.

Interest of  
the Judges.

Although this case deals more particularly with a *quasi-judicial* court, the doctrine seems to apply equally to the judges of regularly constituted courts. And not only may the defendant attack the integrity of the court, but from the judgment of the Vice-Chancellor it appears that the English court is bound to take judicial notice of the fact, and disregard the judgment.

To this second part of the question, Fraud of the Court, the dictum of Chief Justice de Grey seems peculiarly applicable : it certainly appears to be the case to which Lord Coke refers when he says, ‘ Fraud avoids all *judicial acts*, ecclesiastical or temporal.’

Application  
of *C. J. de  
Grey's*  
dictum.

## II. ERROR.

The doctrine with regard to error follows from principle of appeal.

In the first part of this chapter we discussed at some length the principle of appeal. The rule which has been laid down in practice with regard to Error will be found, as indeed it must be theoretically, a corollary from that principle; it is commonly expressed as follows:—The English court will not reopen the merits of a case already determined upon by a foreign court. The question however is a much broader one and includes the following defences which have been raised:—

Division of the subject.

- A. an erroneous conclusion from the facts, or as to the merits of the case.
- B. a mistake in its own law.
- C. a mistake in the law of another country which it has professed to declare.
- D. a mistake as to what law was properly applicable.
- E. a mistake in its own procedure.

An error may be apparent or proveable.

Before proceeding to the consideration of these different heads, there is an important preliminary distinction to be noticed which has provoked much controversy. An error may either be apparent on the face of the documents which have come from the foreign court, and to which we may apply the English technical term ‘record,’ or it may require proof by the aid of extrinsic evidence.

A judgment of a foreign court differs very materially from the form in which an English judgment is first delivered and then formally entered.

Reasons often appended to foreign judgments. [e.g. *Mrs Bulkeley’s case*, *cf.* pp: 294, 295.]

Incorporated in the judgments of nearly all foreign countries are the formulated reasons which led the Court to the decision at which it arrived: It therefore becomes necessary to ascertain whether these reasons form part of, and are to be received as, the judgment; or whether they are to be considered merely as appendages to it, for the information of the parties. In *Reimers v. Druce* there were reasons appended to the judgment, and Romilly, M.R., said:—‘There is no evidence, but I cannot doubt ‘but that these reasons formed part of the record, and that they ‘must be treated as an integral part of the judgment in the same ‘way as where an arbitrator makes an award and appends to it ‘the reasons or grounds for having made that award. The ‘reasons therefore are examinable.’ And in *Simpson v. Fogo* Wood, V.-C., said:—‘I have clearly a right to look at these

*Reimers v. Druce*,  
26 L. J.;  
Ch: 196.

They are to be treated as part of the judgment.

*Simpson v. Fogo*,  
32 L. J.;  
Ch: 249.

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‘reasons as signed by the Judges, as part of the judgment, ‘appearing as they do on the face of the record, like the *jugements* ‘*motivés* of the French Judges.’ If this be so, the alleged error itself and very probably the reason for it, will appear in these appended reasons; and as they form part of the judgment, we have a mistake which may be very properly said to be apparent on the face of the proceedings.

We shall see that the preliminary distinction was objected to by Lord Blackburn; but even if it be unsound it is not an unnatural one for the purpose of considering the question. For greater convenience we propose to discuss it coupled with the first main division of the subject, the principles of course applying to all the other divisions.

A. *That the foreign court has come to an erroneous conclusion from the facts of the case, or as to its merits.* Error on the facts, or on the merits.

## a. A PROVEABLE ERROR.

The effect of this defence is, the defendant asserts that the foreign court, having had the facts of the case proved before it, has come to an erroneous conclusion upon those facts; that the judgment thereupon is erroneous; and that he, the defendant, can prove the error to the satisfaction of the English court. Proveable error.

That such a defence cannot be entertained follows as an immediate consequence from the principle of appeal:—‘Since the A bad defence, ‘decision in the case of the *Bank of Australasia v. Nias*, we are ‘bound to hold that a judgment of a foreign court having jurisdiction over the subject matter cannot be questioned on the ‘ground that the foreign court had come on the evidence to an ‘erroneous conclusion as to the facts’ (Cockburn, C.J.—*Munroe v. Pilkington*). *Tarleton v. Tarleton* is one of the earliest cases upon the question: Lord Ellenborough, C.J., then said, ‘I thought ‘I did not sit at Nisi Prius to try a writ of error in this case upon ‘the proceedings abroad’: but it was more elaborately considered in the *Bank of Australasia v. Nias*. Lord Campbell, C.J., in delivering judgment, refused either to reconcile or contrast the authorities which had been cited:—‘It is enough to say,’ he remarked, ‘that the dicta against retrying the cause are quite ‘as strong as those in favour of this proceeding; and being left ‘without any express decision, now that the question must be ‘expressly decided, we must look to principle and expediency. ‘The pleas demurred to might have been pleaded, and if there

*Bk. of  
Australasia  
v. Nias.  
20 L. J.  
Q. B. 284.*

*Munroe v.  
Pilkington.  
31 L. J.  
Q. B. 81.  
Tarleton v.  
Tarleton.  
4 M. & S.  
20.*

for the  
following  
reasons.

'be any foundation for them they ought to have been pleaded in 'the original action. They must now be taken to have been in due 'manner decided against the defendant.' The learned judge then went very fully into the reasons for not allowing what in effect would be a new trial, reasons which are indeed incontrovertible. Documents may be lost or not forthcoming: witnesses may be dead: in colonial cases the defendant may be conscious that he has no ground of appeal to the Privy Council, and in foreign cases to the foreign Court of Appeal. 'If he has this opportunity 'of again contesting his liability he may, from the loss of evidence 'by the plaintiff, or from a temptation to bring forward false 'evidence himself, unconscientiously resist the payment of a just 'demand which had been solemnly adjudicated upon by a competent tribunal.' The proper course being provided in all countries for appealing against erroneous judgments, there can be no hardship in requiring him to adopt that course. Shortly the rule is this: the English court will not re-open the merits of the case. In *Gold v. Canham*, 'a partner, having retired under 'an agreement of indemnity against partnership claims, was allowed 'a sum of money recovered by the sentence of a foreign court 'for customs due to the Duke of Florence without examination 'of the merits: the justice whereof is not examinable here.' And in *Martin v. Nicholls*, an action on a judgment recovered in Antigua, Leach, M.R., refused to allow a commission to issue to examine witnesses in the Island, because it would be tantamount to saying that the judgment might be over-ruled on the merits.

*Gold v.  
Canham.*  
2 Sw : 325 n.

*Martin v.  
Nicholls.*  
3 Sim : 458.

The merits  
of the case  
will not be  
reopened.

Commission  
to examine  
witnesses  
abroad  
refused.

[See the remarks on the issue of a commission in a recent case in an action on the original cause of action. *ante*, p. 31.]

Fresh  
evidence  
will not  
warrant a  
departure  
from the  
rule.

As in the case of the principle of appeal it has been established that a new defence will not be entertained in this country; so in this case, the fact that fresh evidence has been discovered which was not known before judgment was pronounced and which perhaps shows that judgment to have been erroneous, will not warrant a departure from the rule. (*De Cosse Brissac v. Rathbone*.)

*Brissac v.  
Rathbone.*  
30 L. J :  
Ex : 238.  
*Rankin v.  
Goddard.*  
55 Ma :

The same rule was acted on in *Rankin v. Goddard* [Maine], where the new evidence was directed to mitigation of damages.

Rep : 389.  
*Kingsmill v.  
Warrener.*  
13 Q. B. 18.

A somewhat interesting suggestion was made by Spragge, V.-C., in *Kingsmill v. Warrener* [Upper Canada] as to the examination of the merits of the case:—'When the foreign judgment is 'attempted to be enforced in the very country where the cause 'of action arose, the defendant should be allowed to question the

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'merits.' It was not however supported by the rest of the Court, and there seems no very strong reason why the ordinary rule should be departed from.

β. AN APPARENT ERROR.

'A foreign sentence, though not strictly pleadable, yet has been held by Lord Kenyon to be conclusive evidence, and only 'to be falsified by showing error apparent' (Lord Colchester's MSS:—cited 3 Swanston p. 712). 'A foreign judgment of a 'competent court may be impeached, if it carries on the face 'of it a manifest error' (Sir R. Phillimore, *Messina v. Petrocchino*, delivering the judgment of the Privy Council: Sir J. W. Colville, Sir R. Phillimore, Sir J. Napier, Sir Montague Smith, and Sir R. P. Collier):

Apparent  
error.

Decision of  
the Privy  
Council.

*Messina v.  
Petrocchino.*  
L. R. 4  
P. C. 144.

*Reimers v.  
Druce.*  
26 L. J:  
Ch: 196.  
Bk: of  
*Australasia*  
*v. Nias.*  
20 L. J:  
Q. B. 284.

This opinion of the Privy Council follows the judgment of Romilly, M.R., in *Reimers v. Druce*:—'It is clear that a foreign judgment sought to be enforced in this 'country, is, in addition 'to the grounds referred to by Lord Campbell, C.J., in the *Bank of Australasia v. Nias*, impeachable for error apparent on the 'face of it, sufficient to show that such judgment ought not to 'have been pronounced. But this leaves open the nature and 'extent of the apparent error sufficient to invalidate the judgment. 'By that, I mean, such error as shows upon the face of the 'judgment itself, without any extrinsic evidence, that the Judges 'had come to an erroneous conclusion (either of law or) of fact.'

Definition  
of apparent  
error.

'Effect can only be given to foreign judgments when they are 'good on the face of them.' (*May v. Ritchie*—Lower Canada.)

*May v.  
Ritchie.*  
16 L. C.  
Jurist 8r.

[See also the Indian Code of Civil Procedure, ss: 13. 14. post. p. 380]

These are the most important decisions supporting the principle which establishes such an important distinction between apparent and proveable errors: there remains to be stated the very eminent opinion against it.

Conflict of  
decisions.

On the other hand there is the dictum of Blackburn, J., in *Godard v. Gray*. The defence that the judgment proceeded on a mistake cannot be set up, and 'it can make no difference that 'the mistake appears on the face of the proceedings. That, no 'doubt, greatly facilitates the proof of the mistake; but if the 'principle be to enquire whether the defendant is relieved from 'a *primâ facie* duty to obey the judgment, he must be equally 'relieved whether the mistake appears on the face of the proceedings, or is to be proved by extraneous evidence.'

Lord Black-  
burn's  
opinion.

*Godard v.  
Gray.*  
L. R. 6  
Q. B. 139.



The position taken up by the different learned editors of Smith's Leading Cases upon this point is somewhat remarkable. In the original note to *Doe v. Oliver* the proposition is distinctly stated that a judgment is not conclusive in the face of an apparent error. *Novelli v. Rossi* is the only case cited in support, and as Blackburn, J., points out, Lord Tenterden's judgment does not contain one word in favour of the doctrine. In subsequent editions however the proposition has disappeared, and it has been replaced by one relating to 'apparent wilful error.'

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*Doe v. Oliver.*  
2 Sm :  
L. C. 448.  
*Novelli v. Rossi.*  
2 B. & Ad :  
757.

It will be well to bear in mind the order of date in which these three judgments were delivered—*Reimers v. Druce*, 1857; *Godard v. Gray*, 1870; *Messina v. Petrocchino*, 1872. But the dicta are so conflicting that it is impossible to lay down with certainty any rule upon the subject; to anticipate the decision of the courts when the point comes expressly before them. A few suggestions only can be offered towards the solution of this most difficult question.

*Reimers v. Druce.*  
26 L. J :  
Ch ; 196.  
*Godard v. Gray.*  
L. R. 6  
Q. B. 139.  
*Messina v. Petrocchino.*  
L. R. 4  
P. C. 144.

Impossible to frame a rule at present.

Illustrations.

We will consider a simple illustration (hoping that the use of the algebraical  $x$  and  $y$  will not be confusing to the reader) :—The English court is asked, let us suppose, to enforce a foreign judgment, upon the face of which appears the conclusion that  $2 \text{ plus } 2$  equals  $5$ .

This is in illustration of the principle of *Reimers v. Druce* :—There is a conclusion from certain facts, so palpably erroneous, that no extrinsic evidence can possibly be needed to contradict it : again,

The English court is asked, let us suppose, to enforce a foreign judgment, upon the face of which appears the conclusion that  $x \text{ plus } y$  equals  $5$ — $x$  and  $y$  being unknown quantities (the facts of the case into which the court may not enquire).

This is in illustration of the principle of the *Bank of Australasia v. Nias* :—There is a conclusion from certain facts ; but there is nothing upon the face of the judgment to show that this conclusion is palpably erroneous. For all that the English court can tell, it may be perfectly logical and accurate : it is in ignorance of the method pursued for arriving at the conclusion, and not being a Court of Appeal, it is not its business to enquire. The defendant indeed says that that conclusion is wrong, and that he will prove it to be wrong, showing—by extrinsic evidence—that, say  $x$  was equivalent to  $2$ , and  $y$  was also equivalent to  $2$  ; and that therefore  $x \text{ plus } y$  cannot equal  $5$ .

*Bk. of Australasia v. Nias.*  
20 L. J :  
Q. B. 284.

The answer of the English court is evident. We cannot go



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into the merits of the case. If it be as the defendant says, that  $x$  *plus*  $y$  does not equal 5, that should have been proved in the foreign court. If he did endeavour to prove it there, he failed; for that court, having considered the evidence laid before it, has declared the correct conclusion from those facts to be, that  $x$  *plus*  $y$  equals 5. That decision is binding upon the defendant.

The first case, so far as a simple clerical error is concerned, seems perfectly simple. The rule laid down by the Italian courts

*Palandri v. Lauthier*,  
J. D. I. P.  
1883, p. 87.

in *Palandri v. Lauthier*, as to the production of the foreign judgment seems very much in point: the judge may refer to the record to *clear up* any disputed questions that may be raised. But when we get beyond this, for the present it can only be said that the principle of appeal militates very considerably against the reception of the doctrine as laid down in the *obiter dictum* of the Privy Council.

B. *That the foreign court has made a mistake in the interpretation of its own law:* Error in its own law.

that is, a mistake in the *lex fori rei judicate*.

There appears to be no clearer proposition relating to the enforcement or recognition of foreign judgments than that 'the foreign judgment is *primâ facie* evidence of the law therein laid down' (Parke, B., *Alivon v. Furnival*). And the dictum of Cockburn, C.J., in *Munroe v. Pilkington* is to the same effect:—  
'Upon what grounds the judgment of the American court proceeded is a question on which it is unnecessary to speculate. It is enough that, being satisfied that the question of the defendant's liability must be determined by the *lex loci* of the contract, we have the decision of a local court of competent jurisdiction as to what that law is.'

*Alivon v. Furnival*,  
3 L. J.:  
Ex: 241.  
*Munroe v. Pilkington*,  
31 L. J.:  
Q. B. 81.

Preliminary proposition.

The proposition is still clearer, where the decision is one from which the unsuccessful party might and, as we have seen, should have appealed in the Courts of Appeal of the foreign country, and he has not done so: in such a case 'the decision is about the best evidence you can have of the law of the country' (Hayes, J., *Dent v. Smith*).

*Dent v. Smith*,  
L. R. 4  
Q. B. 414.  
*Becquet v. McCarthy*,  
2 B. & Ad.:  
951.  
*Alivon v. Furnival*,  
3 L. J.:  
Ex: 241.  
*Messina v. Petrocchino*,  
L. R. 4  
P. C. 144.

The expansion of the proposition also holds good:—'The foreign judgment must be assumed to be in accordance with the foreign law'—(Lord Tenterden, C.J., *Becquet v. McCarthy*, approved in *Alivon v. Furnival*). Or;—'It must be presumed that the foreign court rightly interpreted and applied the foreign law.'—(Sir R. Phillimore, *Messina v. Petrocchino*.)

Expansion of preliminary proposition.

From these propositions this deduction easily follows:—a foreign judgment, when it is brought into the English courts to be enforced or recognised, is not examinable on the ground of a mistake in the interpretation and application of its own law—(*Bank of Australasia v. Nias*, followed by Cockburn, C.J., in *Munroe v. Pilkington*, and by Martin, B., in *De Cosse Brissac v. Rathbone*; Romilly, M.R., *Reimers v. Druce*; Lord Colonsay, *Castrigue v. Imrie*). For the foreign court is much more competent to decide questions arising on its own law than our courts can be—(Lord Tenterden, C.J., *Becquet v. McCarthy*).

Application  
of general  
principles.

The same result is more simply arrived at by the aid of the general principles of defence:—The English court, in making such an enquiry would be performing the functions of a Court of Appeal.

In *Kerby v. Elliot* [Upper Canada], the principle was doubted, and Chewett, J., went to the length of saying that he supposed the defendant should be allowed to plead that he had properly set up the Statute of Limitations in the foreign country, and that it had been overruled, [but see p. 202 *et seq.*]

*Meyer v. Ralli* con-  
sidered.

The case of *Meyer v. Ralli* remains to be considered.

There had been a decree in France which was said to be manifestly erroneous according to French law. The French court had held that freight was due in its entirety upon the cargo, as if the whole voyage had been completed, although from stress of weather the ship had been compelled to put in at a French port, instead of proceeding to her destination. This decree came before the English court in a special case; and the Court of Common Pleas, [Lord Coleridge, C.J., Grove and Archibald, JJ.] held that as the defendant was not a party to this judgment abroad, it was not binding upon him; and also that it was not binding on the court on account of this mistake in the *lex fori rei judicate*.

Archibald, J., in delivering the judgment of the Court, does not appear to have dealt with the general proposition that third parties are not bound by a judgment; but considered first, the proposition that a third party may attack a foreign judgment on the ground of error; and then proceeded to discuss the doctrine now before us—the right of a party to a judgment to attack it on the ground of error in its own law:—‘There is this peculiarity ‘in the case, which does not, so far as we are aware, seem to have ‘occurred before; that, upon the express findings in the special

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*Bk. of Australasia v. Nias.*  
20 L. J. :  
Q. B. 284.  
*Munroe v. Pilkington.*  
31 L. J. :  
Q. B. 81.  
*Brissac v. Rathbone.*  
30 L. J. :  
Ex. : 238.  
*Reimers v. Druce.*  
26 L. J. :  
Ch. : 196.  
*Castrigue v. Imrie.*  
L. R. 4  
H. L. 414.  
*Becquet v. McCarthy.*  
2 B. & Ad. :  
951.  
*Kerby v. Elliot.*  
13 Q. B. 367.

*Meyer v. Ralli.*  
1 C. P. D.  
358.

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*Castrique v. Imrie.*  
L. R. 4  
H. L. 414.

*Becquet v. McCarthy.*  
2 B. & Ad.  
951.

'case, by which both parties are bound, this part of the judgment seems to be manifestly erroneous, in regard to the law of France, on which it professes to proceed.' Then follows a quotation from the judgment of Blackburn, J., in *Castrique v. Imrie*:—'We must (at least until the contrary be clearly proved) give credit to a foreign tribunal for knowing its own law, and acting within the jurisdiction conferred on it by that law;' and one from the judgment of Lord Tenterden, C.J., in *Becquet v. McCarthy*:—'We ought to see very plainly that that court has decided against the French law before we say that their judgment is erroneous on that ground.' From these dicta the conclusion is drawn, that if the mistake in the foreign law clearly appears, the English court will not give effect to the judgment, not merely as in favour of a third party, but also as in favour of the original parties.

This decision points to the division into 'apparent' and 'proveable' error, which was adopted in the general consideration of 'error'; but it hardly goes the length of holding that an 'apparent' error in its own law will be a good ground for our courts to refuse to be bound by the judgment; and that a 'proveable' error in its own law will not be a good ground: Indeed such a division in the case of foreign law appears to be useless; for it is hardly possible to imagine such an error to be 'apparent' in the sense in which this term has been used. The error may *become apparent*—as in this case, being set out in the special case—but the consideration of the error is a consideration of the means whereby the foreign court arrived at its decision; is a re-opening of the case as to its merits; and although the decision in this case of *Meyer v. Ralli* certainly was in favour of allowing the defence, it is with all respect and submission suggested, that an English court would be acting against accepted principles, and would be constituting itself a Court of Appeal from the foreign court.

*Meyer v. Ralli.*  
1 C. P. D.  
358.

C. *That the foreign court has made a mistake in the interpretation of the law of another country, which it has professed to declare, and upon which the judgment is founded.* Error in foreign law.

α. AN ERROR IN ENGLISH LAW.

The earlier opinion upon this point seems to have been, that if the judgment were not *in rem*, it might be disregarded if a mistaken English law had been administered. Earlier opinion as to error in English law.

*Simpson v. Fogo.*  
32 L. J.  
Ch: 249.  
*Novelli v. Rossi.*  
2 B. & Ad.  
757.

This was the decision of Wood, V.C., in *Simpson v. Fogo*: another example of this doctrine was there cited—*Novelli v. Rossi*. (Whether this case is an example or not seems doubtful; Black-

Application  
of pre-  
liminary  
principles.

burn, J., in *Godard v. Gray* denied its application.) But if as before, we here apply the preliminary principles, the same result is arrived at as in the preceding case of an error by the foreign court in its own law:—To go behind the judgment; to criticise the method by which the Court arrived at its conclusion was an application of English law; to see what part of that law was applied, and test the method of applying it, seems to belong entirely to the province of a Court of Appeal, and therefore not within the province of the English court.

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*Godard v. Gray.*  
L. R. 6  
Q. B. 139.

Opinion in  
Smith's  
Leading  
Cases.

This was the unanimous opinion of the Judges and the Lords in *Castrique v. Imrie*:—‘We cannot enquire whether they were right ‘in their views of the English law.’ In *Munroe v. Pilkington*, although the point was raised during the argument, the Court declined to give an opinion upon it, as it was not directly before them. But the proposition as laid down by the very learned author of Smith’s Leading Cases in the original note to *Doe v. Oliver*—‘It is clear that if the judgment appear on the face of ‘the proceedings to be founded on a mistaken notion of English ‘law, it would not be conclusive,’—drew from Lord Blackburn, in *Godard v. Gray*, that very strong expression of dissent that we have already noticed: and which applied not only to errors of fact, but to all other errors:—‘Nor can there be any difference,’ he adds to what has already been quoted [page 121], ‘between a ‘mistake made by a foreign tribunal as to English law, and any ‘other mistake.’

*Castrique v. Imrie.*  
L. R. 4  
H. L. 414.  
*Munroe v. Pilkington.*  
31 L. J.  
Q. B. 81.

*Doe v. Oliver.*  
2 Sm.  
L. C.  
[8th ed  
775.

Extension of  
principle:  
Whether  
court  
employed  
proper means  
to ascertain  
English law.

To this principle must be added an extension of it: No enquiry can be entertained as to whether, under the circumstances, the foreign court took the proper means of satisfying themselves with respect to the view they took of the English law administered by them. (Lord Colonsay, *Castrique v. Imrie*.)

It is the defendant’s duty to see that the English law is put properly before the court. If it is not, he must take the consequences.

For example, the judgment will not be disregarded, although the foreign court too hastily concluded what the law of England was: e.g. that it must be what, according to their view, the law of every mercantile country ought to be (Cockburn, C.J., *Castrique v. Imrie*, in the Exchequer).

[in Exch :  
Ch.] 30  
L. J. : C. P.  
177.

Error in the  
law of any  
other  
country  
incidentally  
involved.

#### β. AN ERROR IN THE LAW OF ANY OTHER COUNTRY.

·The defence that the foreign court has made a mistake as to the law of some third country incidentally involved, cannot be

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*Godard v. Gray.*  
L. R. 6.  
Q. B. 139.  
*Meyer v. Ralli.*  
1 C. P. D. 358.  
*Castrique v. Imrie.*  
L. R. 4.  
H. L. 414.

raised; the same principles applying to this as to the preceding cases. (Blackburn, J., *Godard v. Gray*.) Thus Archibald, J., in *Meyer v. Ralli*:—‘If this judgment (of a French court) had professed to declare what is the law of Austria, though equally wrong, we might have been bound by *Castrique v. Imrie* to give ‘effect to it.’

On this subject of error in law the remarks of Blackburn, J., in *Castrique v. Imrie* are peculiarly applicable:—‘We apprehend ‘that all that can be required of a tribunal adjudicating on a ‘question of foreign law is to receive and consider all the ‘evidence as to it which is available, and *bona fide* to determine ‘on that as well as it can, what the foreign law is. If from the ‘imperfect evidence produced before it, or its misapprehension of ‘the effect of that evidence, a mistake is made, it is much to be ‘lamented, but the tribunal is free from blame.’ It is true that the learned judge was indicating what was the duty of an English court when it has to determine a question of foreign law: the duty of a foreign court when it has to determine a question of English law cannot of course be placed on a higher footing.

The duty of a court in determining on foreign law.

D. *That the foreign court has made a mistake as to what law was properly applicable.*

*Dent v. Smith.*  
L. R. 4.  
Q. B. 414.

In *Dent v. Smith* the point was raised that the foreign court had applied the law of France, instead of, as the case required, the law of Russia.

Error in law properly applicable.

Cockburn, C.J., held that the principle of appeal applied in this case also; that it was a matter with which the English court had nothing to do; and that it must be taken that whatever the foreign court did, it acted within its proper authority.

E. *That the foreign court has made a mistake in its own course of procedure.*

Following the same principles that have guided us in the foregoing discussions, we must assume that the foreign court is best capable of knowing what its own procedure is; and that if the English court enquires whether a mistake has been made in this procedure during the hearing of the case abroad, it will be acting as a Court of Appeal:—‘It appears to me that we cannot ‘enter into an enquiry as to whether the foreign court proceeded ‘correctly as to their own course of procedure.’ (Lord Colonsay, *Castrique v. Imrie*.)

Error of the court in its own procedure.



So too Wigram, V.-C., in *Henderson v. Henderson* :—‘ Another objection was the absence or irregularity of service. It is represented that the party had on different occasions actual notice of the suit, and of the relief which was sought against him by it ; however irregularly that notice may have been communicated, if the plaintiff thought that he might safely disregard the proceedings and abstain from interposing any defence on the ground of their irregularity, I think I ought to consider him as having relied on the strength of his case for establishing that irregularity by a complaint *in the same jurisdiction or in the Court of Appeal*, and not to have relied on being therefore able to set the decree of the court at defiance even while it remained unreversed.’

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*Henderson*  
*v. Henderson*.  
3 Hare, 100.

A difficulty sometimes arises from the statement of this principle of error in another way : The foreign judgment is not examinable. This is somewhat misleading for of course ‘ the foreign judgment must be examined, as all other judgments, to see what it professes to decide ’ (Romilly, M.R., *Reimers v. Druce*), in other words to see what is the conclusion arrived at : but ‘ whether or not the court arrived at that conclusion by proper means I am not at liberty to enquire although inflicting the grossest injustice ’ (Lord Kenyon, C.J., *Geyer v. Aguilar*). ‘ I assume this judgment ‘ to be regular in all its parts ’ (Lord Abinger, C.B., *Russell v. Smyth*). In the former case the injustice seemed so strong that the learned Chief Justice almost rebelled at being bound by such a rule ; ‘ The French courts,’ he said, ‘ seem in this instance ‘ to have proceeded on Algerine (nay, on worse) principles ; ‘ because they proposed to proceed according to law, but in ‘ reality made the law a stalking-horse for an act of piracy ’ : nevertheless he felt himself compelled to enforce the judgment.

*Reimers v.*  
*Druce*,  
26 L. J. : Ch.  
196.

*Geyer v.*  
*Aguilar*,  
7 T. R. 681.  
*Russell v.*  
*Smyth*,  
9 M. & W.  
810.

The doctrine  
of error is  
hardly  
consistent  
with Lord  
Blackburn's  
rule of  
defence.

With reference to this question of error perhaps the most remarkable point is that Lord Blackburn is one of its strongest supporters. And yet from the rule of defence which his Lordship has laid down the reverse of this principle would seem the most natural consequence. Because it might surely with great force be said that an error should excuse the performance of the obligation, even if it did not at once negative its existence : and this argument becomes all the stronger when the error is one in English law. This consequence of the rule does not seem to have occurred to the learned judge, for in the judgment in *Godard v. Gray*, he goes immediately after its enunciation to the authorities overruling a plea of error which he considers conclusive. This

*Godard v.*  
*Gray*,  
L. R. 6  
Q. B. 139.



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fact alone seems, with great submission, to prove that that rule of defence is inadequate, because it omits all reference to the fundamental doctrine, that of appeal.

Mr Wheaton's conclusions on the defences discussed in this *Wheaton*. section are : that, if it is clearly or unequivocally shewn by extrinsic evidence that it has manifestly proceeded upon false premises or inadequate reasons ; or, upon a palpable mistake of local or foreign law, it will not be enforced.

Dr Story's conclusions are somewhat similar [Conflict of Laws, *Story*. §§ 607, 618 *d.*]

'It is easy to understand that the defendant may impeach the original § 607.

'justice of the judgment by shewing, that

'upon its face it is founded in mistake ; or, that

'it is irregular and bad by the local law, *fori rei judicate*.'

'It cannot be impeached in England by showing that the foreign court 'has mistaken the law of England upon an English contract' : § 607.

'But the courts of England may disregard the judgment, *inter partes*, if it 'is founded upon a misapprehension of what is the law of England : § 618 *d.* § 618 *d.*  
'or that

'it proceeds upon a distinct refusal to recognise the laws of the country

'under which the title to the subject matter of the litigation arose.' § 618 *d.*

### III. JURISDICTION.

We now come to the defence attacking the jurisdiction of the *Jurisdiction of foreign court.* foreign court which has pronounced the judgment, and as in the case of the defence raising the plaintiff's fraud, if we sought no more than a bare statement of a rule we might rest satisfied with the somewhat superficial statement that there seems to be no break in the authorities, tracing them back from the present time, in favour of its being successfully raised.

That absence of jurisdiction should form a good defence, is said *General statements.* to be consonant with the most elementary principles of justice ; the line of argument being based upon Baron Parke's dictum somewhat in the following manner : An alien owes no allegiance to the laws of a foreign state : a man, not in any way subject to the laws of a foreign state, cannot be held bound by the decisions of its courts : a judgment pronounced against him by such a court cannot raise a legal obligation to obey that judgment : the existence of the obligation may therefore be at once negatived :— 'An inquiry is open whether the judgment passed under such 'circumstances as to shew that the court had properly jurisdiction 'over the party.' (Lord Denman, C.J., *Ferguson v. Mahon*.) 'It 'may very well be held that the foreign country has no jurisdiction

*Ferguson v.*  
*Mahon.*  
11 A. & E.  
179.

‘to pronounce judgment against a person behind his back, who is ‘not subject to its jurisdiction.’ (Blackburn, J., *Castrique v. Imrie*.)

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Courts must  
in certain  
cases have  
jurisdiction  
over  
foreigners.

However satisfactory this reasoning may at first sight appear, its resemblance to that general argument, also based upon Baron Parke’s dictum, which, as we have pointed out, might easily be raised in favour of a defence setting up ‘Error of the Court,’ cannot fail to be noticed; it therefore requires much consideration, for even those judges who have expressed their approval of it, have found it necessary at once to qualify it by an admission, that circumstances very frequently exist by reason of which a subject of one state must be, and in fact is universally admitted to be, under the laws of a foreign state; and that therefore when a judgment is pronounced against him by the courts of that foreign state in accordance with those laws, there does arise a legal obligation to obey that judgment.

*Castrique*  
*v. Imrie*.  
30 L. J.  
C. P. 177.

This is a most important qualification, and if we accept the maxim *omnia præsumuntur rite esse acta*, which was held to be expressly applicable to foreign courts in *Taylor v. Ford*, we see at once that the qualification is of more importance than the rule it qualifies; that is to say, a thorough understanding of the exceptions which have been ingrafted upon it, is of more practical utility than the accumulation of vague arguments in support of the general rule.

*Taylor v.*  
*Ford*.  
22 W. R. 47.

We propose therefore to examine the whole question of Jurisdiction.

The  
question of  
jurisdiction  
to be fully  
considered.

As we have already hinted, the subject of Jurisdiction is a very complicated one. The outline of the general theory, which was necessary by way of introduction to the chapter on Injunctions, must now be elaborated.

Jurisdiction  
to pronounce  
judgment  
depends on  
right to  
summon.

The jurisdiction to pronounce judgment in a suit depends solely on the right to summon a person before the tribunal to defend the suit; for the progress of a suit, once validly commenced in any court, will not be affected by change of residence or country by the defendant:—‘If the defendants had been at the time when the suit ‘was commenced resident in the country, so as to have the benefit ‘of its laws protecting them, or, as it is sometimes expressed, ‘owing temporary allegiance to that country, we think that its laws ‘would have bound them.’ (Blackburn, J., *Schibsy v. Westenholz*).

*Schibsy v.*  
*Westenholz*.  
L. R. 6  
Q. B. 155.

Obedience to a writ of summons, or whatever may be the initial process in an action, being a necessary consequence of residence within the territory of a state, the first form of jurisdiction which

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we find is that exercised over *residents*, whether subjects or foreigners. And with regard to this residential jurisdiction the proposition relating to foreign judgments is a perfectly simple one. A judgment pronounced against a defendant resident in the state at the time of service of the writ is good, and will, in virtue of the general theory, be enforced by the courts of another country, when the proper procedure for bringing it before them is put in motion.

Obedience to summons necessary consequence of residence for any period.

And this, with the exception in the case of lands situated in a foreign country to be noticed hereafter, is irrespective of whether the cause of action arose in this country or in any other:—‘Though every fact arose abroad, and the dispute was between foreigners, yet the courts we apprehend would clearly entertain and determine the cause if in its nature transitory, and if the process of the court had been brought to bear against the defendant by service of a writ on him when present in England’ (Brett, J., *Jackson v. Spittal*). This rule is not only applicable to English courts, but to all countries where there is no special regulation (as in France) with regard to suits between foreigners.

Irrespective of where cause of action arose.

*Jackson v. Spittal*.  
L. R. 5  
C. P. 542.

*Blake v. Blake*.  
18 W. R.  
944.

*Sturlia v. Freccia*.  
W. N.  
1877, pp: 166,  
188.  
1878, p. 161.  
*Matthai v. Galitzin*.  
L. R. 18  
Eq: 340.  
*Doss v. Sec-*  
*retary of India*.  
L. R. 19  
Eq: 509.

There have been a few English judges however, notably Vice-Chancellor Malins, who have refused to accept it. In *Blake v. Blake* he inferred that it was impossible for two foreigners to come here to have their disputes decided. We shall see another example of this, in his refusal to order security for costs where both parties were foreigners in *Sturlia v. Freccia*, which was afterwards reversed by the Court of Appeal [see p. 194]: and another in his judgment in *Matthai v. Galitzin* [see p. 142]; and in *Doss v. Secretary of State for India* he enunciated a principle which, although applicable to realty, is not the universal rule:—‘Where there is a complete tribunal capable of deciding the question where the property is, and where the parties are, that is the tribunal to be resorted to.’

Although purely elementary it is an important proposition and must not be lost sight of, because it is sometimes asserted (more often certainly by foreign than by English judges), that a court in one country has no power at all over a subject of another country; and it is important, because the converse is equally true, that with cessation of residence, or absence from the territory, comes a cessation of this necessity for obedience to the writ of summons, even in the case of subjects of the country.

It is important also in another respect, because it points very forcibly the exact bearing of the principle of appeal just considered. If at the inception of the suit the defendant was by residence

General view of this section of the chapter.

subject to the jurisdiction of the foreign court, it is clear that for the English court to entertain any defence, whether it be fraud, error, against natural justice, or against International Law, it must be arrogating to itself the powers and duties of a Court of Appeal. It is therefore only when we get to the case of a defendant not resident within the jurisdiction at the inception of the suit, that the real difficulty should arise. It may be convenient to state at once the object of this section of the chapter: We propose to examine the whole question of jurisdiction, and to point out those cases in which the court has an extended jurisdiction, that is jurisdiction over non-resident defendants, and to show that in these cases also the principle of appeal applies.

This then is the simple rule of jurisdiction.

Necessity  
for extended  
jurisdiction.

But it is very evident that, the subjects of one nation being scattered over all parts of the globe, having complicated commercial relations with the subjects of other nations, owning property real and personal within the confines of other territories, this rule of itself is insufficient for the proper regulation of business affairs. For were there no other rule in force a subject debtor would be able, by leaving the country before action brought, to evade the jurisdiction of its courts; an alien after contracting a debt during temporary residence in the country would, by leaving it before a writ could be served upon him, be completely free; and commercial debts, contracted without even this temporary residence, could not by any means be adjusted by the tribunals of either country. In each case the creditor could have no redress except by falling back on the common law maxim *actor sequitur forum rei*, pursuing and suing his debtor into whatever country he could find him.

This  
extended  
jurisdiction  
termed  
Assumed  
Jurisdiction.

Some extension of this simple rule of residential jurisdiction has therefore become very necessary, and it may be considered as well established that there has now been adopted another species of jurisdiction, the principle of which, having been accepted by all nations, has now become part of International Law. This new jurisdiction we have termed for convenience Assumed Jurisdiction.

‘This point is one of great importance. Besides its application ‘to shipping-contracts made in all parts of the world, the daily ‘increasing trade with the more adjacent countries of the continent, in the course of which numerous orders are given abroad, ‘either to firms wholly foreign, or to British subjects resident and ‘carrying on business abroad, but which orders are to be fulfilled ‘in England, makes the question one of the greatest mercantile ‘interest’ (Brett, J., *Jackson v. Spittal*).

*Jackson v.*  
*Spittal.*  
L. R. 5  
C. P. 542.

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This assumed jurisdiction is therefore an express variance from the simple rule, and from the maxim *actor sequitur forum rei*; and it includes all those cases in which the legislature has declared that its courts *may* summon before it an absent defendant, whether subject or alien.

An exception to maxim *actor sequitur*.

But the difficulty that we have to contend with is, that whereas the fundamental principle may be said now to form part of International Law, because in some form or other it is to be found in the laws of all states; yet there is at present no agreement between them as to the extent of its application, that is to say as to the cases to which it shall be applied. The consequence is that although some of these cases may be common to all or to a great number of states, there are other cases in which, each state acting in its own discretion for the benefit of its subjects, there is no common ground between the enactments of the different legislatures. This must to a certain extent jeopardise the full recognition of the principle, or at all events tend to limit that recognition to those cases which are universally adopted. We shall endeavour to show that this is not the true doctrine. For the present it is sufficient to say that if it were, its injurious effects would reflect considerably on this country.

Initial difficulty: countries are not uniform in the cases to which it is applied.

We propose to point out as we proceed where there is agreement and where difference between foreign laws and our own, without trespassing more than is absolutely necessary on the province of those chapters which will be specially devoted to foreign law.

So too the manner in which the summons or notice is to be conveyed to the absent defendant whether subject or alien must vary in different states: but this is a matter to be separately considered in the chapter on 'Service out of the Jurisdiction.' It is important however not to allow this minor question to impede in any way our present discussion, which must be considered as an examination of the principles involved, preparatory to the further discussion involving points of practice and construction.

[chapter viii.]

The subject will be considered under the following heads:—  
Domiciliary Jurisdiction—Territorial Jurisdiction—Contractual Jurisdiction—Jurisdiction in actions of tort—Special Jurisdiction—and Company Jurisdiction.

i. *Domiciliary Jurisdiction.*

We have said that the rule with regard to simple or residential jurisdiction, that which is created by mere residence or even presence within the kingdom, applies equally to subjects and

Domiciliary jurisdiction.

[cf. p. 131.]



aliens : and that the necessary consequence, if that rule stood alone, would be that a subject out of the kingdom could not be brought before its courts even for debts contracted within it.

The old  
process of  
outlawry  
explained.

The truth of this is illustrated by the method in which, in former times, this evil was attempted to be remedied by an irregular extension of the old system of 'Outlawry.' In a civil suit outlawry was the punishment inflicted by law on a party, by putting him out of the protection of it, for his contempt in wilfully avoiding the execution of the process of the King's Court. But if he were abroad at the time the *exigent* was awarded, although purposely to avoid the suit or his creditors, he could not be regularly outlawed, because he could not take cognisance of the process and proclamation against him, their publication not being possible beyond the dominions. Now although an outlawry in such a case was erroneous, and might have been reversed as of right on a writ of error, technically it would not have been an irregular outlawry so as to entitle the defendant as of right to have it reversed on motion for irregularity. And therefore the outlawry would in general have the effect of attaining the purpose for which it was obtained ; for, in consequence of the delay and expenses occasioned to the defendant by a reversal on writ of error it was not usual to get a reversal by that course. It was more usual to apply to the court on motion to set it aside, and then it would only be set aside on the terms of the defendant entering an appearance if the outlawry were on mesne process, or that he should pay the debt and costs if it were on final process : and generally the defendant was ordered to pay the costs of the application : If however the defendant had an agent in this country who conducted his affairs (unless he were one for a particular purpose and with no power to appear to the writ) the outlawry obtained without application to this agent would be set aside with costs, because the defendant in such a case could not be said to have been avoiding the process of the court. The ordinary forfeiture consequent upon outlawry did not accrue in personal actions, it being only made use of to compel an absent defendant to submit to the jurisdiction of the court. [Chitty's Archbold, 8th ed : 1847 ; p. 1132 *et seq.*]

The change  
introduced  
by C. L. P.  
Act.

We are left in doubt whether this singular procedure was made use of against foreigners as well as against subjects : however that may be, the errors of principle involved in it must have very forcibly struck the Law Reformers, and in 1852 the Common Law Procedure Act introduced what is now known as Service out



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of the Jurisdiction: in other words it declared that in certain cases therein specified, special permission would be granted to plaintiffs to serve writs on subjects and notices of writs on aliens, who were defendants out of the kingdom.

Section 18 enacted what seems a simple rule, that with regard to British subjects, when the cause of action arose within the jurisdiction (and in one other case) the writ might issue and be served beyond the jurisdiction.

Section 19 provided a slightly different procedure in the same cases with regard to absent defendants not British subjects.

The Rules of Court 1875, while defining more precisely, as we shall see, the different causes of action in respect of which the leave would be granted, perpetuated the rule that no difference except as to procedure was to be made between subjects and aliens.

Rules of  
Court 1875.

We believe it to be the universal rule abroad that absent subjects may in all cases be cited: and in some countries this rule is extended so as to include absent though domiciled aliens, who may in certain cases be cited by residents.

Foreign law.  
[cf. chapters  
xiii. & xiv.]

Thus in Belgium, foreigners may be cited before Belgian tribunals either by a Belgian or a foreigner if they are domiciled or resident in the kingdom, or if they have elected to be domiciled in it. [Code of Civil Procedure, s. 52. ii.]

In Italy, foreigners may be cited for engagements contracted in a foreign country if they have a place of abode in the kingdom even should they not be there at the moment. [Code of Civil Procedure, s. 106. i.]

In the Canton of Vaud, foreigners may be cited in the cases mentioned in s. 8 of the Civil Code, when, having been domiciled in the Canton, they have no known domicil, if the action be commenced within three months of their leaving the Canton. [Code of Civil Procedure, s. 4. iv.]

In the State of New York, the order will be granted in the case of persons not being residents of the State, where the absence from the State is to avoid service or defraud creditors: and where a resident of the State has been continuously without the United States for six months, and has not designated anybody to accept service. [Code of Civil Procedure, s. 438. i. ii. iii.]

And now in this country, the Rules of Court 1883, have in part abolished the old rule, and for the first time have introduced as an intermediate class between subjects and aliens, people domiciled or usually resident in the kingdom.

Rules of  
Court 1883.

Order XI. rule 1. (c), provides that the leave for service will be

given whenever 'any relief is sought against any person domiciled 'or ordinarily resident within the jurisdiction.'

First then as to the persons to whom this rule applies—

Persons to  
whom rule  
applies.

'Any person domiciled': that is, aliens in whom the *animus revertendi* has disappeared, or, who having the *animus revertendi*, yet are ordinarily resident in the kingdom; and all subjects who are not domiciled nor ordinarily resident in other parts of the world. The question as to what constitutes 'ordinary residence' will doubtless necessitate much judicial interpretation. It may possibly be that a rule based upon section 6 (1) of the Bankruptcy Act of 1883, may be adopted; that is to say, the defendant must, within a year before the date of the leave to issue the writ, have ordinarily resided or had a dwelling house or place of business in England.

[cf: p. 329.]

Secondly, as to the cases in which it applies.

The cases in  
which it  
applies.

'Whenever any relief is sought': therefore so far as such persons are concerned there is no limitation to the cases in which they may be served when out of the jurisdiction; the cause of action need not necessarily have arisen in the jurisdiction. An action on a foreign judgment of course comes within the rule. But with regard to absent subjects domiciled or ordinarily resident in other parts of the world, they will only be liable to service in the cases provided by the remaining sub-sections of rule 1.

[cf: p. 233.]

The first part of sub-section (d) follows as a logical consequence from this rule of domiciliary jurisdiction.

Administra-  
tion of estate  
of deceased  
person  
domiciled.

It provides that the service shall be allowed whenever 'the 'action is for the administration of the personal estate of any 'deceased person, who at the time of his death was domiciled 'within the jurisdiction.' But the *lex domicilii* being the law applicable to the administration of the personal estates of deceased persons, it was of course necessary in this case to exclude the estates of persons 'ordinarily resident.'

## ii. Territorial Jurisdiction.

Territorial  
Jurisdiction.

The second form of jurisdiction which we noticed was that which arises in respect of property situate within the kingdom. It will be remembered that we said that although the possession of property created a jurisdiction over the owner, it does not import obedience to the Queen's writ of summons if the owner were absent, but necessitates a submission to the writ of execution when issued upon it on lawful occasion arising. This jurisdic-

Possession of  
property  
imports  
submission  
to writ of  
execution.

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tion extends over real and personal property, and over native and alien owners. The rule however in no wise overrides nor forms any extension of the rule of residential jurisdiction, and the owners of property therefore are not on account of the existence of the property amenable in any suit instituted against them by residents: although, if the suit, once begun against them when temporarily resident, terminate adversely, this property as we have said will be taken in execution. 'We doubt very much 'whether the possession of property locally situated in the country 'and protected by its laws makes the possessor bound :—it should 'rather seem that whilst every tribunal may very properly execute 'process against the property within its jurisdiction; the existence 'of such property, which may be very small, affords no sufficient 'ground for imposing on the foreign owner of that property a duty 'or obligation to fulfil the judgment.' (Blackburn, J., *Schibsby v. Westenholz*.)

*Schibsby v. Westenholz.*  
L. R. 6  
Q. B. 155.

But it is obvious that suits may arise in connexion with the property so situate within the kingdom, either as to its tenure, or as to its transfer, or with regard to liabilities in respect of it; and it would manifestly be more convenient to have such actions tried in the country although the owner may be non-resident. And as to the law applicable in all actions relating to real property we find a rule of universal acceptance: disputes as to realty wherever situate are to be determined by the *lex loci rei sitæ*.

The division relates to suits in connexion with property in the jurisdiction.

The inevitable consequence of this is that it is the universal practice of nations to assume jurisdiction over absent defendants, whether subject or alien, in all, or nearly all, suits relating to property within the territory.

Universal rule to assume jurisdiction in such cases.

This connexion between the rules of law and service was specially noticed by Lord Westbury, C., in *Cookney v. Anderson*.

*Cookney v. Anderson.*  
1 D. J. & S.  
365.

In this country the rule of 1875 was that leave to serve the writ out of the jurisdiction would be allowed 'whenever the 'whole or any part of the subject matter of the action is land or 'stock or other property situate within the jurisdiction; or any 'act, deed, will or thing affecting such land, stock or property.'

By the Rules of Court 1883 the law now stands as follows—Order XI., rule 1. Leave will be granted whenever—

(a). The whole subject matter of the action is land situate within the jurisdiction (with or without rents or profits); or

(b). Any act, deed, will, contract, obligation or liability affecting land or hereditaments situate within the jurisdiction, is sought to be construed, rectified, set aside, or enforced in the action.

Pending judicial interpretation of this new rule we may notice the alterations that have been introduced.

Alterations  
introduced  
by new  
rule.

The reason for confining (a) to cases where the whole subject matter relates to land is not self-evident ; it may perhaps be to save confusion as to costs : it will necessitate the two parts of the action, which otherwise would have been tried together, being brought separately.

Personalty  
now  
excluded.

With regard to the property itself, the parenthesis '(with or without rents or profits)' has been introduced in conjunction with land : but the most important change is the omission of 'stock or other property,' by which actions relating to personalty situate within the jurisdiction have been excluded from its operation.

The reason for this change is not obvious. It may possibly be found in the absence of any such universal rule relating to personalty as exists in the case of realty. The maxim usually applied to personal property is *mobilis sequuntur personam*, but the truth of it, as Mr Westlake points out [International Law, 2nd ed : chapter vii], may well be doubted ; it is certainly not true to say that the law of the place where the person is affects all his moveable property wherever situate. In truth the difference between real and personal property in this respect is very great : for whereas in actions relating to realty there is, as we have said, but one law applicable, that of its situation ; in actions relating to personalty the law applicable depends, not on the nature of the property, but on the nature of the action. Thus there are cases in which the *lex domicilii* of the owner determines the dispute ; as between the representatives of the deceased : there are cases in which the *lex loci contractus* determines it ; as between parties to a contract dealing with the property : there are cases in which the *lex loci rei sitæ* determines it ; as in actions of trover or detinue : and there are cases in which the *lex fori* determines it ; where the laws of procedure override all other laws.

But even if this be the reason, it does not satisfactorily account for the omission of actions relating to incorporeal property in the jurisdiction ; and this omission is likely to work considerable hardship. Take for example an infringement of an English copyright, the whole piracy having been consummated in this country by a foreigner who afterwards leaves it ; the owner of the copyright would be unable to sue in England, except for an injunction.

The alterations in (b) are verbal amplifications of the old rule.

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Let us now consider a little more fully the nature of this territorial jurisdiction with regard to real property.

That the principle thus embodied in this rule of English law ought to be recognised when it is also the law of a foreign state was admitted by Romilly, M.R., in *Cood v. Cood*; and with regard to foreign judgments proceeding on such a law their complete recognition in other states follows as a matter of course. This doctrine cannot be expressed in better terms than in the headnote to the

*Cood v. Cood.*  
33 L. J.  
Ch: 273.

The application of the rule to realty.

*Munroe v. Douglas.*  
4 Sandford,  
126.

very elaborate American report of *Munroe v. Douglas* [New York], which is adopted by Story [Conflict of Laws, § 591]; 'A judgment of the *forum rei sitæ* respecting land or other immoveable property is of universal obligation, and absolutely conclusive as to all matters of right and title which it professes to decide: and is equally conclusive in respect of the proceeds of such land in whatever country the same may afterwards be found.' The last sentence is important, and would seem to be a legitimate extension of the doctrine, as it incorporates the equitable principle of conversion; always supposing that this principle is recognised abroad.

Judgment of *forum rei sitæ* of universal obligation. Story § 591. [The word 'obligation' evidently should be 'recognition' cf. p. 250.]

From this the rule of defence may be deduced, that where the foreign court has no jurisdiction over the thing, as it is commonly expressed, the foreign judgment will not be recognised: in other words if a court pronounces a judgment affecting land out of its jurisdiction, the courts of the country where it is situated, and it is presumed also the courts of any other country, are justified in refusing to be bound by it, or to recognise it; and this even if the judgment proceed on the *lex loci rei sitæ* [cf. Story, Conflict of Laws, § 591]. This rule is to be found in most of the foreign codes; and it was expressly declared to be the practice of the English courts to decline jurisdiction in suits relating to realty abroad, although the defendant be within the jurisdiction, in *Mostyn v. Fabrigas*: by Mellor, J., in *the Buenos Ayres Ry: Co. v. The Northern Ry: Co. of Buenos Ayres*: and again by Jessel, M.R., in *Norton v. Florence Land Co.*—'The English court has no right here to determine questions between foreigners relating exclusively to immoveable property in their own country; it must always consider whether the foreign court is not the proper tribunal.' [cf. also *Pike v. Hoar*: *Pitts v. La Fontaine*.]

Simple rule of defence where court has no jurisdiction over the thing.

Story § 591.

*Mostyn v. Fabrigas.*  
1 Cowp:  
161.  
*Buenos Ayres Ry: v. Northern of Buenos Ayres Ry:*  
2 Q. B. D.  
210.  
*Norton v. Florence Land Co.*  
7 Ch: D. 332.  
*Pike v. Hoar.*  
2 Eden 182.  
*Pitts v. La Fontaine.*  
5 App: ca:  
564.

The English courts decline jurisdiction in suits relating to foreign land.

This is the case to which we referred on page 131, as forming an exception to the rule that all suits between foreigners will be entertained in this country.

The use of the word 'foreigners' by Jessel, M.R., leaves us in



*Query*  
whether  
rule solely  
applicable  
to foreign  
owners.

some doubt as to the course which would be pursued with reference to real property situated in a foreign state belonging to an English subject. It would seem however that the rules, depending on the position of the property rather than on the nationality of the owner, would apply equally to whatever country the owner belonged.

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In *re Holmes* a demurrer to a petition of right, claiming a title to certain lands in Canada against the Crown, was allowed. *re Holmes* 2 J. & H. 527.

In *Blake v. Blake* a plea to the jurisdiction was allowed, the action being in respect of a contract relating to land in Ireland : *Blake v. Blake*, 18 W. R. and in *Reiner v. Marquis of Salisbury* a bill of discovery, in aid of proceedings about to be taken in England to recover land in India, was disallowed. *Reiner v. Salisbury*, 944. 2 Ch. D. 378.

In *Doss v. Secretary of State for India* one of the grounds for the dismissal of the suit was that the property was in India : the action did not however relate to realty, but to a charge upon the revenues of Oudh. *Doss v. Sec. for India*, L. R. 10 Eq. 509.

In *Graham v. Massey, re Hawthorne*, Kay, J., refused to entertain a suit, all parties being within the jurisdiction, in which there was a *bona fide* claim on both sides of title to land, or the proceeds of land, in Saxony ; he said that the plaintiffs were asking the court to declare that a 'testator was a constructive trustee of lands in 'Dresden of which he had taken possession, and procured himself 'to be registered as owner.' *Graham v. Massey*, 23 Ch. D. 743.

But it will  
not decline  
it in certain  
suits.

But, always assuming the defendant to be within the jurisdiction, and so, capable of being served with process, the question sometimes arises whether the English courts have any right to exercise jurisdiction in respect of disputes arising out of land situated in a foreign country ; whether the rule we have just considered should not be construed so as to refer solely to suits relating to the title of land abroad.

Action for  
rent of  
foreign  
premises.

In the Buenos Ayres Railway case above referred to, both plaintiff and defendant were domiciled in the Argentine Republic but were resident in England. The action was for rent of premises situated in the Republic, where the contract was entered into. The rule just mentioned was held to relate simply to questions as to the ownership of such property ; and that when the parties (*query* defendant) are within the jurisdiction an action for rent of such property would be entertained. This was said to be subject however to a most important qualification, 'unless the 'foreign court has by its law exclusive jurisdiction.' The foreign court has of course jurisdiction ; but if the foreign law does not



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*Norton v.  
Florence  
Land Co:*  
7 Ch: D. 332.

*Moor v.  
Anglo-  
Italian  
Bk:* 10  
Ch: D. 681.

*Mostyn v.  
Fabrigas.*  
1 Cowp: 161.

*Roberdeau  
v. Rous.*  
1 Atk: 543.

*Archer v.  
Preston.*  
1 Vern: 75.  
*Arglasse v.  
Muschamp.*  
ib: 135.  
*Kildare v.  
Eustace.*  
ib: 419.  
*Cranston v.  
Johnston.*  
3 Ves: 170.

*Jackson v.  
Petrie.*  
10 Ves: 164.  
*White v.  
Hall.*  
12 Ves: 321.  
*Penn v.  
Baltimore.*  
1 Ves: Sen:  
444.

*Tulloch v.  
Hartley.*  
1 Y. & C:  
Ch: 114.  
*Toller v.  
Cartet.*  
2 Vern: 494.  
*Paget v.  
Ede.*  
L. R. 18  
Eq: 118.

expressly enact that its courts alone have jurisdiction in *all cases* relating to realty within the dominions, then in an action for rent the English courts also have jurisdiction to entertain the suit (all the requisites being present), and the two jurisdictions are concurrent. In *Norton v. Florence Land Co.*, the rule was further qualified thus:—‘If a suit has already been commenced abroad ‘the English courts will not actively interfere between the same ‘litigants.’ See also *Moor v. Anglo-Italian Bank*, and the cases cited on page 74, on the subject of Injunctions.

The principle is of great antiquity and is to be found in the old case of *Mostyn v. Fabrigas*, argued before Lord Mansfield, C.J., in 1774:—‘In every case to repel the jurisdiction of the King’s ‘Court, you must show a more proper and sufficient jurisdiction.’

So far then it seems clear that the English courts will entertain an action for rent of lands situate abroad, and we find an instance of this as far back ‘as *Roberdeau v. Rous*. There is however a series of cases which carry the principle a great deal further.

*Archer v. Preston, Lord Arglasse v. Muschamp, Lord Kildare v. Eustace and Lord Cranston v. Johnston*, establish that with regard to disputes relating to the land itself, although the court cannot act on the land directly, it can act upon the conscience of a person living here; and with regard to any contract made, or equity between persons in this country respecting lands in a foreign country, the court will hold the same jurisdiction as if they were situated in England; thus in the last case Sir R. P. Arden, M.R., decreed a reconveyance of lands in St. Christopher’s.

The same doctrine was recognised in *Jackson v. Petrie* and *White v. Hall*.

In *Penn v. Lord Baltimore* the court decreed the performance of an agreement touching the boundary of a province in North America; Lord Hardwicke, C., said that the court had ‘no original ‘jurisdiction on the direct question of the original right of the ‘boundaries, but the bill did not stand in need of that. It was ‘founded on articles executed in England under seal for mutual ‘considerations: and this gave jurisdiction to the King’s Courts ‘both of law and equity, whatever be the subject matter.’ A similar decree was made in *Tulloch v. Hartley*. In *Toller v. Carteret* a mortgage in the Isle of Sark was foreclosed.

In *Paget v. Ede* a decree was also made, because ‘a fore- ‘closure decree being *in personam*, depriving the mortgagor of his ‘personal right to redeem, the court has jurisdiction to make such ‘a decree with regard to land in the Colonies, between an English

Old cases in which rule has been much extended.

Mortgage suits.

Said to involve a purely personal decree.

‘mortgagor and mortgagee.’ It is obvious that the principle is not limited to lands in the Colonies, but extends to all lands out of the jurisdiction. Vice-Chancellor Bacon said he could not ‘hesitate for a moment in saying that the suit which was brought ‘for the purpose of having the account taken, of realising the estate ‘if it should be necessary, and giving to the mortgagor the opportunity of redeeming it if he thought fit to do so’ was properly brought before that court.

The cases  
examined by  
*Romilly*,  
*M.R.*

The doctrine of these cases was elaborately reviewed by *Romilly*, *M.R.*, in *Norris v. Chambers*, which was a suit by a plaintiff residing in England against defendants also residing here to declare and enforce a lien on some mines belonging to the defendant in Prussia;—‘The early cases cited establish that when a ‘plaintiff in England has an equitable money demand against the ‘defendant also residing here, this demand will be enforced by the ‘court here, not merely against the defendant personally, but if ‘the circumstances of the contract or dealing between the parties ‘justify it, by a declaration of a lien against the real property of ‘the defendant out of the jurisdiction of the court, and even in ‘some cases by the appointment of a receiver. This is the full ‘extent of the assertion of jurisdiction by this court, and there is ‘always this difficulty that the declaration and decree of this court ‘may be a mere *brutum fulmen*, incapable of being practically ‘enforced against the defendant. Still if the plaintiff is entitled ‘to it, the court must give him the decree as he asks for it, and ‘then leave him to make it available or not as he can in the ‘foreign country. But in this case the facts either constitute a ‘valid hypothecation of the defendant’s mine in Prussia in favour ‘of the plaintiff, or they do not. If they do, it is in Prussia and by ‘the courts of law of that country that this hypothecation is to be ‘enforced. If they do not, I cannot make a charge upon, or ‘hypothecation of it. In the other cases the equity between the ‘parties was complete; the plaintiff was entitled to compel the ‘defendant personally to pay him a sum of money, the declaration ‘of the lien and the appointment of a receiver which followed ‘were only to enforce more completely the decree which the ‘plaintiff had obtained for payment against the person or property ‘of the defendant here.’

*Norris v.*  
*Chambers*  
30 L. J :  
Ch : 285.

The decision of Vice-Chancellor Malins in *Matthæi v. Galitzin* is deprived of much of its value because it proceeded on the learned judge’s expressed antipathy to hear suits between foreigners. The bill was filed against a foreigner living for the time being

*Matthæi v.*  
*Galitzin*.  
L. R. 18  
Eq : 340.

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in England and also against an English company formed for working a Russian mine, to restrain the company parting with some of the profits of the mine, and also for an account of the profits. The current of authority certainly seems to support the jurisdiction of the English court for which the plaintiff contended.

The principle arrived at by Lord Romilly would seem therefore to be, that although an order affecting the lands would be made in consequence of a prior decree here adjudicating a sum to be due from plaintiff to defendant, an original suit to obtain such an order would not be entertained. If this be sound it must rest on the same theory as the right to issue an injunction restraining a foreign suit; this it will be remembered resolved itself into a purely personal question and was found to be dependent on the presence within the jurisdiction of the party to be enjoined. This

*Portarlington v. Soulby*,  
3 My. &  
K. 104.

*re Holmes*,  
2 J. & H.  
527.

analogy was traced by Lord Brougham in *Lord Portarlington v. Soulby* [*cf.* p. 66]. There is much room however to doubt its soundness, and indeed to question the accuracy of the whole series of cases extending the principle of the action for rent of foreign realty to all other disputes touching such property. And there does not seem to be much difference between this principle and the argument in *re Holmes*, which was also based on the early cases, and which was overruled by Wood, V.-C. :—‘The argument ‘is that where a question is raised with reference to land in a ‘foreign country in such a manner as merely to call upon the court ‘to determine or enforce some right by a decree *in personam*, that ‘the court has jurisdiction to interfere: and it is suggested that ‘upon obtaining a declaration or decree against the Crown *in personam* here, the suppliant would acquire the right through ‘that decree, to which a foreign court would give effect. It is ‘asked accordingly that this court should direct a conveyance to ‘be made in accordance with the provisions of the provincial ‘statute.’

*Orr-Ewing v. Orr-Ewing*,  
9 App. ca.  
34.

[The doctrine of the early cases was however very recently approved *obiter* by Lord Selborne, C., in *Orr-Ewing v. Orr-Ewing*.]

A practical way of looking at the question is this; what respect would be paid by an English court to a similar order touching lands in England emanating from a foreign tribunal? A foreign judgment for rent of premises situate here would doubtless be enforced, but it seems different with regard to a reconveyance, a decree affecting boundaries, or even a foreclosure decree, of land here; the general rules which we have been discussing are certainly antago-

The order would be inoperative in the foreign country.

nistic to any recognition being accorded to such a judgment. Taking therefore an English judgment such as we have been considering, it is certain that the order would be inoperative in the foreign kingdom without a proper application being made to the courts for an *exequatur* upon it; and precisely the same end would be attained if this application were in respect of the money decree alone, instead of in respect of the declaration affecting the real property, for this would ultimately be taken in execution by process on the foreign *exequatur*.

The application of the rule to personalty. But a general jurisdiction is sometimes assumed over foreign owners of personalty.

Secondly, we must consider the nature of territorial jurisdiction with regard to personal property.

We have already noticed on page 138 the omission from Order XI. of actions relating to personalty situate within the jurisdiction. We have now to consider an extension of principle which obtains in some countries; that is, a *general jurisdiction* over foreign owners of personalty situate in the dominions is assumed in all suits, such property (which includes debts due by third parties to the defendant) being seized or attached before the action is commenced. The rule that the execution is limited to the property so seized is however by no means universal.

Foreign attachment.

Instances of this occur in Scotch arrestment,—*arrestum jurisdictionis fundandæ causâ*;—Trustee Process, in the city of New York, and the *Saisie-arrest* of continental nations; these will be more fully considered under the respective countries in which they obtain. To a very limited extent this assumption of jurisdiction is known to English law, under the form of Foreign Attachment in the City of London, the peculiar privilege of the Lord Mayor's Court. The custom being to this extent universal, although it can hardly be said to rest on a very sound basis, it may be assumed that a judgment proceeding on a foreign process would be recognised in England, and *vice versa*.

Examples of recognition of custom.

Suppose, for instance, money attached according to the custom of the City of London. In an action in the courts of a foreign country in which a similar custom obtained, it would be a good reply to a defence setting up want of jurisdiction in the English courts, to plead that the money had been so seized. This principle was acted upon in *Holmes v. Remsen* [New York], in which the American court recognised an English judgment in foreign attachment. The opposite doctrine however was acted upon in *Campbell v. Steele* [Pennsylvania].

*Holmes v. Remsen*.  
4 Johns: Ch: 460.  
*Campbell v. Steele*.  
11 Penn: Rep: 394.  
*Gould v. Webb*.  
24 L. J.: Q. B. 205.

The case of *Gould v. Webb* is an example of the recognition of

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the custom of another country by the English courts :—the plea stated that part of the amount claimed had already been attached in the defendant's hands, and had been paid according to the law of New York ; and therefore that the defendant was discharged and acquitted of the said sum. It was held a good defence *pro tanto*. Lord Campbell, C.J., said :—‘The plea substantially avers ‘that the law of Foreign Attachment prevails at New York, and ‘that the defendant as garnishee had by process of law been compelled to pay over to the sheriff of New York a debt which he ‘owed the plaintiff.’ From the nature of the case we do not find any instance of an action brought to enforce a judgment proceeding on such customs.

*Fletcher v. Rodgers.*  
27 W. R. 97.

In *Fletcher v. Rodgers*, a case which has been already noticed [cf. p. 67.] under the head of injunctions, certain property had been seized in San Francisco according to Californian law, as security for any damages that might be recovered in the action commenced there. Brett, L.J., said :—‘I doubt if the seizure alone gave that court ‘jurisdiction, *but I will assume such to be the case*, and that by the ‘law of California if property be in that country it may be seized, ‘and thereupon jurisdiction is founded. That is not contrary to ‘natural justice nor contrary to good faith.’

The second part of subsection (d) follows as a logical consequence from the rule of territorial jurisdiction.

It provides that the service shall be allowed whenever ‘the ‘action is for the execution (as to property situate within the jurisdiction) of the trusts of any written instrument, of which the ‘person to be served is a trustee, which ought to be executed ‘according to the law of England.’ The rules of construction of trust deeds being the same as those with regard to wills, the reason of this is obvious : it applies to both real and personal property.

Rule extended to cases of trusts.

iii. *Jurisdiction ex Contractu.*

Contracts relating to lands or hereditaments situate within the jurisdiction have already been considered on p. 137, under Order XI, rule 1 (b).

We now come to the question of contracts under rule 1 (c).

Under the Common Law Procedure Act, 1852, s. 18, the writ could be issued out of the jurisdiction either where the cause of action arose within the jurisdiction, or where the cause of action was in respect of the breach of a contract made within the jurisdiction.

Contractual jurisdiction.



By the Rules of Court, 1875, this was altered to 'whenever the contract which is sought to be enforced or rescinded, dissolved, annulled or otherwise affected in such action, or for the breach whereof damages or other relief are or is demanded in such action, was made or entered into within the jurisdiction, and whenever there has been a breach within the jurisdiction of any contract wherever made.'

By the Rules of Court, 1883, this has again been altered, and it is provided by Order XI, rule 1 (e), that the writ shall issue 'whenever the action is founded on any breach or alleged breach of any contract wherever made, which according to the terms thereof, ought to be performed within the jurisdiction.'

*James, L.J.* In *ex parte Blain, re Savers*, Lord Justice James most clearly expounded the principles upon which an absent alien defendant might with justice be summoned before the tribunals of a foreign state in respect of contracts:—'An English statute is only applicable to English subjects or to foreigners who by coming into this country, whether for a long or for a short time, have made themselves during that time subject to English jurisdiction. The English law has a right to say to any one, If you make a contract in England, or commit a breach of a contract in England, under a particular Act of Parliament particular procedure may be had by which we can effectually try the question as to that contract and that breach, and with regard to any property you may have in this country we may give execution against that property: and further, if the foreigner being served with a writ under the provisions of the Judicature Act, does not choose to appear, the Legislature is right in saying, If you do not appear you will commit a default in that way, and we will give judgment against you. To what extent the decision of such a question, or whether that judgment would under such circumstances be recognised by foreign tribunals, as being consistent with international law and the general principles of justice, is a matter which must be determined by them.'

*exp: Blain, re Savers.*  
12 Ch:  
D. 322.

The rule  
of 1875  
considered.

Contracts  
made in  
U.K.

We propose for the sake of convenience to consider this question on the basis of the rule of 1875.

In the first place that rule related to actions arising out of contracts made within the United Kingdom.

*Blackburn,*  
7.

The general theory on which this assumption of jurisdiction is based was considered by Blackburn, J., in *Schibsy v. Westenholz*:—'If at the time the obligation was contracted the defendants were within the foreign country, but left it before the suit

*Schibsy v. Westenholz.*  
L. R. 6  
Q. B. 155.



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'was instituted, we should be inclined to think the laws of that country bound them.' Of course the interpretation of the contract would be governed by the *lex loci*, but the learned Judge goes further : the making a contract in a foreign state under the auspices of its laws, is a *quasi*-submission to those laws which relate to contract, among which may be one giving a right of action to either party in its courts. The English law, as we have seen, adopts this principle : the above dictum enunciates the more general doctrine that, wherever a state authorises an absent defendant to be summoned before its courts in suits relating to contracts made in that state, the judgment in such suit will be recognised. Taking a practical view of the question, if the contract came before the courts in any other country all questions would be determined according to the *lex loci contractus* ; there can therefore be very little difficulty in accepting as conclusive, and in enforcing a judgment emanating from that country.

In the second place the rule related to actions arising out of contracts wherever made : that is, if there were a breach within the jurisdiction of a contract made abroad, the absent defendant might be summoned to appear in this country. This was formerly a much-vexed question among the Judges, not only as to whether the Common Law Procedure Act allowed it, but also as to the soundness of the principle.

Contracts  
wherever  
made.

*Sichel v. Borch.*  
33 L. J.  
Ex: 179.

In *Sichel v. Borch*, the Court of Exchequer held that the whole cause of action must have arisen within the jurisdiction ; and that therefore where the contract was made abroad and the breach occurred in England, the case was not within the statute.

The cases  
on which the  
rule is based.

*Allhusen v. Malgarejo.*  
L. R. 3  
Q. B. 340.

In *Allhusen v. Malgarejo*, the Queen's Bench upheld the same doctrine, Lush, J., saying expressly that 'cause of action' was a comprehensive term, including every circumstance which goes to make up a contract and a breach :—'If a foreigner comes here and makes a contract in this country, and there is a breach abroad, he can be sued here, but if the contract be made with a foreigner abroad and the breach takes place here, he cannot be sued.'

*Jackson v. Spittall.*  
L. R. 5  
C. P. 542.

But in *Jackson v. Spittall*, the Court of Common Pleas decided that the intention of the act clearly included this case. The contract was made in the Isle of Man : the breach occurred in Manchester. It was argued on the lines of the two decisions just quoted that 'cause of action' meant whole cause of action, that is, contract and breach ; and that although a breach out of the jurisdiction of a contract made within was sufficient for granting

the leave, yet the converse case, a breach within the jurisdiction of a contract made without, was not. But, as the Court pointed out, this involved the term 'cause of action' being used in two different senses; in the one case meaning the whole, contract and breach; in the other, breach only. 'Cause of action' means, not only in a popular sense but also in a legal sense, 'the act on 'the part of the defendant which gives the plaintiff his cause of 'complaint;' and this view is emphasised by the manner in which the rule of 1883 has been worded.

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Conflict  
between the  
courts.

In *Vaughan v. Weldon*, the same question once more arose in the Common Pleas; and in consequence of the conflict between the courts, a conference of Judges was held: the result was that Lord Coleridge, C.J., announced 'that the majority of the judges 'were in favour of following the decision of the Court of Common 'Pleas: that the judges of the Court of Queen's Bench, though 'still remaining of the same opinion as before, had for the sake of 'conformity agreed to be bound by the opinion of the majority, 'and that consequently all the Courts would act upon the decision 'in *Jackson v. Spittall*.'

*Vaughan v.*  
*Weldon.*  
L. R. 10  
C. P. 47.

This decision seems to us to be more than an interpretation of a disputed point under a statute; it seems rather to be the enunciation of the principle that such an assumption of jurisdiction is sound: and such the Legislature treated it by sanctioning its admission in Order XI, and thus declaring it to be the law of England.

*Jackson v.*  
*Spittall.*  
L. R. 5  
C. P. 542.

The ground upon which the doctrine rests is quite independent of those considerations arising out of the law of contract which support the former proposition: it might indeed very well exist even though that proposition were abolished: it depends simply on the fact of an act having been done within the jurisdiction, which act gives a cause of complaint to another person: it may be said to be another form of the main principle of the Common Law Procedure Act, which gave the remedy for any cause of action arising within the jurisdiction, the simplicity of which has not been perpetuated. It will not be forgotten that the contract will still be construed according to the *lex loci contractus*.

A verbal modification of the rule has been introduced by the Rules of Court, 1883. Whereas formerly all contracts were apparently included, subsection (e) now limits it to those 'which, 'according to the terms thereof, ought to be performed within the 'jurisdiction,' and this applies to both parts of the above discussion, that is to say both to contracts made within and those made

The rule of  
1883 is a  
verbal  
modification  
of the rule  
of 1875.

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without the jurisdiction. It will be seen at once that this is nothing more than a verbal change, because the breach, or absence of performance, of a contract must evidently occur at the place where the performance was intended.

A very great extension of these rules relating to contracts will be noticed in section v. (b), where there are several parties to the contract, some only of whom are abroad. [cf. p. 151.]

It is unnecessary here to refer to the old authorities which have been collected and reviewed by Story in his Conflict of Laws, [§ 531 *et seq.*], on the three places of jurisdiction known to the civil law in respect of contracts: that is to say, *forum domicilii*—the place where the defendant has his domicile, or the place where he had it at the time the contract was entered into; *forum rei site*—the place where the subject of the contract was situate; *forum rei gestæ* or *forum contractus*—the place where the contract was made or was to be fulfilled, or where any other act was done if the defendant or his property could be found there, although it was not the place of his domicile; suffice it to state that the conclusion at which the learned American jurist arrives goes no further than the simple rule of residential jurisdiction, and omits altogether the questions of assumed jurisdiction which we are now discussing. We venture to rest this, as also the other questions involved in this difficult problem, on higher ground, and assuredly the law of England must do so too: but it is remarkable that this is unnoticed by judges who view with disfavour similar enactments by foreign states. It will be seen that with regard to this question of contractual jurisdiction England is by no means less advanced than other nations.

Different views of jurists as to the 'forum' in cases of contract. Story. § 531.

In France [Civil Code, ss. 14, 15] and Portugal [Civil Code, ss. 28, 29], the rule resembles that of the English rule of 1875, except that it is limited to contracts entered into by foreigners with subjects. Foreign law [cf. chapter xiii.]

In Italy [Code of Civil Procedure, s. 105 (ii)], the rule is limited to obligations arising out of contracts entered into in the kingdom, or those entered into out of the kingdom, but to be executed within it.

In Germany [Code of Civil Procedure, s. 29], the rule is limited to contracts to be performed in the kingdom.

In Belgium [Code of Civil Procedure, s. 52 (iii)], the absent defendant may be served if the obligation giving rise to the cause of action arises, has been or will be executed in the kingdom.

In the Ionian Islands [Civil Code, s. 8], he may be served when the obligation has been contracted with an Ionian in the island. Chapter IV.

In the Netherlands [Code of Civil Procedure, s. 127], he may be served when the suit relates to obligations contracted with a subject in or out of the kingdom.

In Spain [Civil Code, s. 98], foreigners out of Spain 'are subject to the laws of Spain and to the Spanish tribunals for the fulfilment of obligations contracted by them in Spain, should they be in favour of Spanish subjects.'

In Geneva [Law of Dec: 5, 1832, s. 60 (iii)], 'the courts of the Canton assume jurisdiction over non-resident foreigners in respect of obligations contracted by them with persons domiciled in the Canton.'

#### iv. *Jurisdiction ex Delicto.*

Jurisdiction  
in matters  
of tort.

Under the rules of 1875, jurisdiction was assumed whenever any act for which damages were sought to be recovered was done within the jurisdiction. Under this clause, which was much involved owing to the rule with reference to injunctions having been mixed up with it, persons, whether subjects or aliens, were liable to be served when out of the jurisdiction, in respect of torts committed within.

Change  
introduced  
by the new  
rule.

This clause does not appear in the rules of 1883; but assumed jurisdiction in respect of torts still remains under the provisions of rule 1 (c), which as we have seen creates the jurisdiction where *any relief* is sought against any person domiciled or ordinarily resident within the jurisdiction: this therefore includes causes of action in respect of torts wherever committed.

The change of principle is very remarkable: whereas formerly jurisdiction was assumed in respect of the act, it is now assumed in respect of the person committing the act.

For the rules for determining by which law any act is to be adjudged tortious or not the reader is referred to Mr Westlake's Treatise on Private International Law, 2nd ed.; chapter xi, 'Torts'—where the whole subject is very fully discussed.

[cf. chapter  
xiii.]

There do not seem to be any corresponding rules in the foreign codes. It is presumed however that the rule of reciprocity laid down in the Italian Code of Civil Procedure, s. 105 (iii), would be applied in the case of a tort committed in Italy by a non-resident Englishman, domiciled or ordinarily resident in that country.

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v. *Special Jurisdiction.*

Two subsections of Order XI rule 1, (f) and (g), remain to be considered: as they are somewhat special in their nature it is convenient to group them together under the above head.

(a). *In the matter of Injunctions.*

Subsection (f) provides that the service will be allowed whenever 'any injunction is sought as to anything to be done within the jurisdiction, or any nuisance within the jurisdiction is sought to be prevented or removed, whether damages are or are not also sought in respect thereof.' This is substantially the same as the rule of 1875.

This provision would at first sight appear to be at variance with what has already been said on the subject of injunctions and their purely territorial effect, although the act restrained was in some cases the bringing a suit in a foreign court and might even in such cases be addressed to foreigners. But the acts or nuisances to which it refers are those which have been committed, or are expected to be committed within the jurisdiction.

An injunction being obtained by action commenced by writ in the ordinary way, it was obviously necessary to provide for cases where the defendant was abroad. If the act were being done by his agents presumably the injunction would be directed so as to restrain them; but even if it were not, the provisions of this subsection seem to cover every case that can possibly arise. Although the injunction cannot be served abroad, even on a subject, yet it will not from this fact be deprived of vitality: and if the defendant should afterwards come within the jurisdiction the injunction when served upon him will be immediately operative. Therefore so far as its provisions directed to prevention are concerned the rule is complete. But with regard to its provisions directed to cure the same cannot be said: it is however presumed that if, by reason of the continued absence of the defendant, the injunction be incapable of being served, the court would itself enforce its order, by directing the removal of the nuisance.

(b). *In the matter of Co-Defendants.*

Subsection (g) provides that the service will be allowed whenever 'any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction.' This rule is quite new: it



Incorporation of Order XVI.

presumably incorporates with Order XI so much of Order XVI as applies to the joinder of defendants. It clearly cannot apply to the joinder of plaintiffs; but may possibly include the service of an indorsed counter-claim on a new party to the action. [See page 221.] As to third party notices, see page 230.

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The rule among other things extends the rule as to contracts.

The operation of the rule may work some injustice unless it is used with great care: For it must in many cases bring absent defendants before the court who would not be liable, under the other subsections of the rule, to be served with the writ out of the jurisdiction. For example, under Order XVI, rule 6, 'the plaintiff may, at his option, join as parties to the same action all 'or any of the persons severally, or jointly and severally, liable on 'one contract': the contract itself may not fall within Order XI, rule 1 (e); but from the fact of one of the parties to it being within the jurisdiction and therefore capable of being served, all the other parties may be joined as defendants to the action, and are therefore 'necessary or proper parties to the action,' and so within rule (g).

The guarantee for the due administration of the rule however seems to lie in the strict interpretation of the word 'properly':

[c.f. p. 448.]

The decision, referred to in France, in the case of *Helstein v. Shaffauser and Waddington*, might very reasonably be taken as a guide in this interpretation: the parties within the jurisdiction should not be made defendants for the *express purpose* of bringing the absent parties within the rule.

*Helstein v. Shaffauser.*  
J. D. I. P.  
1880, p. 474.

But the convenience of the rule is manifest, for the question between the parties is once and for all decided; but it is a great stride beyond the hitherto recognised rules of assumed jurisdiction. The passing of such a provision however rests, as we shall hereafter contend, entirely in the discretion of the Legislature; we would only now point out that it is a great advance on the previous rules; and that its effect on English subjects may possibly have to be considered at some future date, should it be copied into any of the foreign codes.

#### vi. *Company Jurisdiction.*

Company jurisdiction.

We have now to notice a peculiar form of assumed jurisdiction which does not come within the province of Order XI, namely, the jurisdiction of English courts over non-resident shareholders in English companies.

In the first place with regard to orders for calls on foreign contributories.



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Section 108 of the Winding Up Act, 1848 (11 & 12 Vic: c. 45), provided that the service of notices, summonses, &c., on such contributories out of the jurisdiction might be effected by post. But the Companies Act, 1862, does not contain any similar provision. This method of service was however perpetuated by the decision of the court in *re the General International Agency Co.*, — ‘The making the call would be only the foundation of proceedings in the courts of law abroad to compel payment of the call when made, and of course in those proceedings the question might be raised whether the service so effected was good or not; but to warrant the mere making of the call the court was of opinion that the service by post would be sufficient.’ So in *re the Land Credit Co. of Ireland*, where the notice of the call had been made by post, a balance order to enforce payment of the call was made by Romilly, M.R., ‘subject to any objections which the shareholder might take,’ presumably as before in the proceedings abroad to enforce the order.

Calls on  
foreign con-  
tributories.

*re General  
Agency Co.*  
15 W.R. 973.

*re Land  
Co. of  
Ireland.*  
39 L. J.  
Ch: 389.

It will be useful to notice here the English procedure with regard to enforcing payment of calls against contributories.

A summons stating the proposed amount of such call is to be served at least four clear days before the day appointed for making the call on every contributory proposed to be included in it, notifying the intended application to the Judge to make the call. The Judge may direct that notice of the intended call shall be made by advertisement. When the Judge has made the order, which is for payment of the call into the Bank of England to the account of the official liquidator before a certain day, a copy is to be forthwith served upon each of the contributories together with notice from the official liquidator specifying the amount or balance due from such contributory. This notice contains full instructions as to the manner in which the payment is to be made.

English  
procedure for  
enforcing  
payment of  
calls.

On a summons to enforce payment of the call duly served, and upon proof of the service of the order and notice of the amount due, and of non-payment, an order, called a balance order, may be made ‘for such of the contributories who have made default to pay the sum which by such former order and notice they were respectively required to pay.’ [Rules of Nov: 1862, 33, 34, 35.] It is to the service of these summonses and orders that section 108 of the Winding Up Act, 1848, referred, and to which rule 63 may now be said to apply, and indiscriminately to contributories within or without the jurisdiction.

Service of  
summonses  
and orders.

We have here two orders of the court, the original order and the balance order, and in case of a default by a contributory abroad proceedings on either of them might be taken before a foreign tribunal.

Contribu-  
tories  
domiciled or  
ordinarily  
resident in  
England.

With regard to contributories abroad who are domiciled or ordinarily resident in England, it is presumed that, if there is any object in so doing, these orders might be further supplemented by proceedings in an ordinary action, leave being given to serve the writ out of the jurisdiction under Order XI, rule 1 (c).

English  
subjects.

The question however which at present concerns us is the effect of these orders abroad. It can hardly be possible that any objection to the service would be entertained by the foreign court when the contributory is an English subject; the question is therefore narrowed down to foreign contributories.

Foreigners.

With regard to the service of the summons and orders by post it may perhaps be said that more care should be taken to ensure personal service on foreign shareholders, and that the procedure of Order XI should be adopted. But it must be remembered that although as a matter of course all persons interested are entitled to attend on the hearing of the summons to offer objections to such call, there is very little which can be raised at all in the nature of a defence to the order or decree of the court, and the provisions seem therefore amply sufficient to ensure justice being done.

Foreign  
judgments  
for calls  
against  
English  
share-  
holders.

We have been unable to discover any reported cases in which foreign orders corresponding to these have come before the English courts to be enforced. The question as to the recognition of such orders was however, virtually decided by the Privy Council in *Leishman v. Cochrane*, in which that tribunal upheld a judgment from Mauritius enforcing an order of the Supreme Court of Calcutta on a shareholder, resident in the island, for contribution to an Indian Company. There are two cases however in which foreign judgments against English shareholders for payment of calls have been enforced. The most important is *Copin v. Adamson*.

*Leishman v.  
Cochrane.*  
12 W. R.  
181.

Agreement  
in articles  
as to  
submission  
to particular  
tribunal.

In that case, there was a provision in the French company's articles, under which the shareholders agreed that all disputes which might arise during the existence of the company, or during its liquidation, should be submitted to the jurisdiction of the Tribunal de Commerce of the Department of the Seine, process being left at a domicile to be elected for him should he fail to elect one himself. The Court of Appeal, affirming the decision of the Exchequer, decided that the existence of such provisions

*Copin v.  
Adamson.*  
L. R. 9 Ex:  
345; [on app.]  
1 Ex: D. 17.

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amounted to an agreement on the part of every shareholder, whether a subject of the country, or a foreigner, to be bound by a judgment so obtained.

The principle here enunciated is, that a direct submission will render the shareholder liable to obey a judgment of any tribunal given in accordance with such submission : and that he is without doubt bound by all the statutes and provisions of the company.

*Vallée v. Dumergue.*  
18 L. J.  
Ex: 398.

In *Vallée v. Dumergue* a similar point was decided. The defendant was a shareholder in a French company, and by French law every person is bound on becoming a shareholder to elect a domicile for all purposes of the company, and at which all proceedings in connexion with the company may be left. The defendant had conformed to this law by electing a domicile ; and it was held that having agreed to accept a peculiar form of notification, he was bound by the judgment. The submission here was not to the statutes of the company but to the law of the foreign country.

Submission  
to the  
foreign law.

But a much wider question remains to be considered.

*Copin v. Adamson.*  
1 Ex: D. 17.

In *Copin v. Adamson*, Lord Cairns, C., said :—‘The question might arise whether, without any express averment (of consent by the shareholder), by the law of France as by that of every civilised country, the shareholder would not be bound by all the statutes and provisions of the company in which he was a shareholder ; but that question not arising here I say nothing more about it :’ and it may be added, not only by these statutes and provisions, but also by the whole of the law of the foreign country applicable to, and under which the company has been formed.

Is the shareholder bound by the foreign law without express submission ?

The point was not considered in the Court of Appeal because error was brought on the decision of the court below only with reference to the first replication, which dealt with the shareholder’s express submission ; but in the Exchequer the opinion of the judges was divided as to the second replication, which raised this question of implied submission, Amphlett and Pigott, BB., holding it to be bad, Kelly, C.B., dissenting.

*Bank of Australasia v. Harding.*  
19 L. J.  
C. P. 345.

The group of cases which we have already considered [p. 22] and of which *The Bank of Australasia v. Harding* may be called the typical one, was relied upon in argument as being an authority in favour of the proposition. But the learned Barons refused so to consider it because the Colonial Statute had been obtained at the instance of the company, and the defendant therefore, although not necessarily a shareholder at the time of the passing of the Act, was to be considered as a consenting party to its provisions, and

Application of company cases already considered, p. 22.

therefore bound by them. 'In the absence of such consent it seems to us that the court would have come to a contrary conclusion.' The learned Chief Baron dissented from this narrow view of these important decisions, and based his opinion of them on the judgment of Talfourd, J. :—'The answer to the defendant's plea that he was non-resident and had no notice, is that the defendant was a member of a partnership carrying on business in the colonies, and was contented to leave his property there to be regulated by the law of the colony.'

The share-  
holder  
should be  
bound.

This appears to us to be the true principle of the decisions, and indeed the only view which can be taken of the case. But even were the decision limited in the manner the other judges contended for, their inference from such limitation, that the absence of such consent would have necessitated a contrary decision, is hardly warranted without further argument in support of it. 'Can it be said,' said Amphlett, B., 'that an Englishman, who buys a share in a foreign company on the London Stock Exchange, thereby becomes necessarily bound by any decision to which the foreign tribunal may come upon a matter affecting his interests?' The answer to the question seems obviously, yes, so far as those interests touch the company in question. And this is exactly the prerogative assumed by English law over foreigners who have bought a share in an English company upon, say, the Paris Bourse, so long of course as the name of the purchaser appears on the register.

French  
decisions.

In two cases however, *The Floating Dock Co. v. Cézard* and *the St. Nazaire Co. v. Allair*, the courts in France refused to recognise the orders made in England on French contributories 'pour paiement du montant de leur souscriptions.' In the former case the ground of the refusal was that the defendants had not obtained before the Master of the Rolls the guarantees of 'a serious defence:' in the latter that a foreign court cannot adjudicate 'en matière personnelle et mobilière' against a Frenchman domiciled in France. [These cases will be found more fully set out in chapter xiii, under 'France.']

*Floating  
Dock Co.  
v. Cézard.*  
J. D. I. P.  
1880, p. 105.  
*St. Nazaire  
Co. v.  
Allair.*  
J. D. I. P.  
1882, p. 306.

In *Jamieson v. Robb* [Victoria], a Scotch judgment obtained by the liquidators of a Scotch company against a shareholder resident in Victoria, notice having been given under the Companies Act, 1862, was enforced by the colonial court.

*Jamieson  
v. Robb.*  
7 Vic.  
L. R. L.  
170.

Practical  
consequence  
of opposite  
rule.

It seems to us that the proposition for which the Lord Chief Baron contended is an absolute necessity. Were the opposite rule to prevail and to become settled law, directors of companies

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in every country would be compelled to send 'letters of regret' to all foreign applicants for shares, Stock Exchange committees would have to pass stringent rules with regard to all sales of shares in domestic companies, and thus a severe blow would at once be struck at the very roots of the world's commercial prosperity.

We have now noticed all the cases in which according to English law an absent defendant may be summoned before the English courts, noting shortly by the way the foreign laws on the subject. It becomes necessary to devote some little space to the consideration of the general question involved in the assumption of jurisdiction.

Return to  
general  
subject of  
jurisdiction.

We must revert to the argument contained in the concluding pages of the first part of the first chapter, the discussion of the principle '*jus for jus*.' That argument as we then pointed out [*cf.* p. 20.] was in conflict with the doctrine laid down in *Schibsy v. Westenholz*.

*Schibsy v.*  
*Westenholz.*  
L. R. 6  
Q. B. 155.

General considerations led us inevitably to the conclusion that within due limits every state must pass such laws, as in its discretion seems fit, which must in their operation affect foreigners who are not, and who perhaps have never been within its territory, but who have had relations with residents in that territory.

The  
discretion  
vested in  
every state  
to pass such  
laws is a  
necessity.

Of this doctrine we found an illustration in two decided cases on bankruptcy: we pointed out its bearing on a case of frequent occurrence in general law: and we further found a group of cases relating to companies in which it was manifestly involved. In some of these cases indeed there was a recognition of the right accorded by the foreign law to sue in the foreign country an Englishman not within its dominions.

The principle then deduced from the cases seems to be identical with the conclusion from an argument based on general considerations. We venture therefore to think that the true rule must be, that a state has a discretion vested in it to declare in what cases absent defendants whether subjects or aliens shall be summoned to its courts. That, all states having that discretion vested in them, all other states will recognise the due exercise of it, and enforce a judgment delivered in accordance with it, even though it be against one of their own subjects.

And all  
other states  
should  
recognise  
the exercise  
of the  
discretion.

This rule as we have said conflicts with the maxim *actor sequitur forum rei*: but that maxim can no longer be said to exist in its integrity, for every country has introduced exceptions to it. It seems strange that the country which has itself incorporated the most important and numerous of these exceptions should be one

The old  
maxim no  
longer exists  
in its  
integrity.



of the most prominent in denouncing their existence in the laws of other nations.

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Judgment of  
*Blackburn, J.*, in  
*Schibsy v. Westenholz*  
fully con-  
sidered.

We must now turn to the fuller consideration of the case we have so repeatedly quoted, *Schibsy v. Westenholz*.

*Schibsy v. Westenholz*.  
L. R. 6  
Q. B. 155.

One of the arguments on which our contention has been based seems to have been before the Court :—‘ We were much pressed,’ said Blackburn, J., ‘ that the British legislature has, by the ‘ Common Law Procedure Act, conferred on our courts a power ‘ of summoning foreigners, under certain circumstances, to appear, ‘ and in case they do not, giving judgment against them by default. ‘ It was this consideration principally which induced me at the ‘ trial to entertain the opinion which I then expressed and have ‘ since changed.’ The reason for this change is declared to be that if there were any such thing as the supposed comity, ‘ we ‘ could hardly decline to enforce a foreign judgment given in ‘ France against a resident in Great Britain under circumstances ‘ hardly, if at all, distinguishable from those under which we, ‘ *mutatis mutandis*, might give judgment against a resident in ‘ France.’ We have ventured to point out what we conceive to be the fallacy contained in this argument, which was said by the learned judge to resolve itself into the one question which was put so trenchantly by Lord Ellenborough, C.J., in *Buchanan v. Rucker*, ‘ Can the Island of Tobago pass a law to bind the rights of ‘ the whole world?’ : ‘ Can one nation pass a law to bind the whole ‘ world?’

*Buchanan v. Rucker*.  
9 East 192.

‘ We admit, with perfect candour, that in the case of a judgment obtained in this country against a foreigner under the ‘ provisions of the Common Law Procedure Act, being sued on in ‘ the courts of the United States, the question for the court of ‘ the United States would be, Can the Island of Great Britain ‘ pass a law to bind the whole world?’ The answer to this question is then given :—‘ No, but every country can pass laws to ‘ bind a great many persons ; and therefore the further question ‘ has to be determined, whether the defendant in the particular ‘ suit was such a person as to be bound by the judgment which it ‘ is sought to enforce.’

Instances  
given in  
which such  
laws might  
be passed.

Instances are then given in which the learned judge considered that such laws would have been legitimately passed, and the defendant, as one of the ‘ great many persons,’ subject to them. But these instances, for the judgment did not profess to interpret English law but rather to criticise it, being sound must rest on International Law, in other words on the consent of nations to



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*Douglas v.  
Forrest.*  
4 Bing: 686.

recognise the laws on which they proceed. The last instance cited demands special notice. The principle enunciated is that an absent debtor may be summoned for debts contracted in the country. It is given on the authority of *Douglas v. Forrest*. This principle at that time did form part of English law, but as we have said, has now disappeared. But that case was an action on a Scotch judgment given in an action commenced according to Scotch law, the absent defendant having been summoned at the Market Cross of Edinburgh, and at the pier and shore of Leith. And it is most curious to note that Chief Justice Best based his decision on the fact that the Scotch law, in declaring absent defendants liable to be summoned to the Scotch courts in certain cases, resembled English law in the custom of Foreign Attachment: the very argument that Lord Blackburn rejects. This list of instances being considered exhaustive, and 'every one of the suppositions 'contained in them being negatived in the present case' (that is to say, the present circumstances not corresponding with those of any one instance) the Court refused to recognise the French judgment.

Debts  
contracted in  
the country.

The first impression left on the mind after a careful perusal of this judgment is, that the argument has come to a very abrupt conclusion: and this abruptness we venture to think shows its incompleteness. The learned Judge himself admitted the importance of the consideration we have brought forward, for he himself acted upon it at *Nisi Prius*: for the change in that opinion we naturally look for an exhaustive argument; but it rests simply on the fact that there is no precedent. Being therefore a case *prime impressionis* it is much to be regretted that the Court did not consider whether this assumption of jurisdiction, not in the specific case by France alone, but generally by all countries, is sound.

But the principle is acted on by all countries, and therefore it has, we venture once more to repeat, become a part of International Law; and as such, with the greatest submission, we think that the general doctrine should have been recognised rather than a list of isolated instances given.

The principle is acted  
on in all  
states.

*Warrener v.  
Kingsmill.*  
8 Q. B. 407.

What we conceive to be the true principle was enunciated by Draper, J., in *Warrener v. Kingsmill* [Upper Canada]:—'We are 'bound to assume that the course of action was of the proper 'jurisdiction of the foreign court, for they have entertained and 'adjudicated upon it. Nor can we assume it to be beyond 'their jurisdiction, because the alleged trespass took place without 'the territory over which that jurisdiction extended; for if we

'assume that fact to have been known to them, their having given judgment must be taken *prima facie* as proof that by their law they had jurisdiction in such a case,'—and this in fact was recognised by Blackburn, J., in *Taylor v. Ford* [*cf.* p. 130].

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*Taylor v.  
Ford.*  
22 W. R. 47.

But the cases in which it is exercised differ in every state.

It may of course be said that the International Law on any subject can only be that law which is common to the laws of all nations, and that whatever is in excess of that is a violation of International Law: and that therefore, in the case of assumed jurisdiction, only those instances of it can be called part of the Law of Nations which are recognised and adopted by all states. This is sound: but we venture to think, more especially as this law in every state is liable to frequent alteration (as the recent changes in our own rules testify) that the larger doctrine which we have advocated is also sound and must ultimately prevail, that, not the common instances in which the principle is adopted, but the principle itself now forms part of International Law; and that till a consensus of opinion is arrived at, the instances in which it is so adopted must in every case be left to the discretion of the several states.

The principle itself, and not the instances in which there is agreement, is a rule of International Law.

### *Effect of Appearance.*

Effect of appearance.

There remain to be considered a few cases which may conveniently be grouped under the head of effect of appearance.

The importance of the question depends on which theory of jurisdiction is adopted.

In other words, under whatever form the foreign court has decided that it has jurisdiction over the defendant, will he by appearing in the action have waived his right to raise a defence attacking the jurisdiction of that court. It must be noticed that these cases all proceed on the assumption that there is such a right, and that the question whether or not the foreign court had jurisdiction should always be considered by the English court when it is raised by the defendant.

If we deal with the question on the hypothesis of the decision in *Schibsy v. Westenholz*, the question has of course an important bearing on the subject: if however we proceed on the hypothesis of the view of the law which we have ventured to put forward, its importance is somewhat diminished. We have however noted one remarkable Italian case in which not the law of the country, but the *lex retorsionis* was expressly applied in the assumption of jurisdiction [*cf.* pp: 116. 175]. We shall find also, under the head of Violation of Natural Justice, that the foreign procedure against non-resident defendants may, though in a very limited way, be

*Schibsy v.  
Westenholz.*  
L. R. 6  
Q. B. 155.

**Chapter IV.** attacked [*cf.* p. 172]. We must therefore shortly consider this point, the principle being the same whichever hypothesis be adopted.

There is first the very simple case of the plaintiff. 'We think In the case of the plaintiff. that if a person selected as plaintiff the tribunal of a foreign country as the one in which he would sue, he could not afterwards say that the judgment of that tribunal was not binding upon him.' (Blackburn, J., *Schibsky v. Westenholz*.)

*Schibsky v. Westenholz.*  
L. R. 6  
Q. B. 155.  
*Novelli v. Rossi.*  
2 B. & Ad:  
757.

Thus in *Novelli v. Rossi*, the defendant, without waiting for the decision of an English court, which would in all probability have been in his favour, and would have guided the French court in its decision, went at once as plaintiff to the French courts: the decision, given in ignorance of the English law upon the subject, was adverse to him. He was held bound by that decision, it being the consequence of his own act.

The same principle conversely would apply to the defendant:— Voluntary appearance of defendant 'The decision of *De Cosse Brissac v. Rathbone* is an authority that where the defendant voluntarily appears and takes the chance of a judgment in his favour, he is bound' (*id.*).

*Brissac v. Rathbone.*  
30 L. J:  
Ex: 238.

*Molony v. Gibbons.*  
2 Camp: 502.

Thus in *Molony v. Gibbons*, Lord Ellenborough, C.J., held that an action might be maintained on a foreign judgment obtained by default, which stated that the defendant appeared by attorney and said nothing in bar, presuming that the court saw the attorney properly constituted.

See also, as to the effect of an appearance in bankruptcy proceedings, *ex parte Robertson, re Morton* [*ante*, p. 86].

*exp: Robertson, re Morton.*  
L. R. 20  
Eq: 733.

In *De Cosse Brissac v. Rathbone* however the plea took another form: it alleged that the defendants were 'possessed of property in France which was, according to the law of France, liable to seizure in case they did not appear to the suit and in case judgment by default was signed against them, and that in order to prevent their property from being seized they authorised an agent to appear for them as defendants to the suit.' This plea was overruled. Appearance to save property in the foreign country.

But on the wider question whether an appearance in order to endeavour to save property already seized by the foreign court could be considered voluntary, Lord Blackburn seems to have had considerable doubt. He said that in *Simpson v. Fogo*, the mortgagees of an English ship had come into the courts of Louisiana to endeavour to prevent the sale of their ship seized under an execution against the mortgagors, and the courts of New Orleans disregarded their claim; that it was taken for granted by Is this a voluntary submission?

*Simpson v. Fogo.*  
32 L. J:  
Ch: 249.

the Vice-Chancellor and the very learned counsel who argued in the case, that the mortgagees would have been bound by the decision, although they had only appeared to try and save their property, had it not been for the contemptuous disregard of English law by the foreign court:—He implied also that the case of *the General Steam Navigation Co: v. Guillon* supports the proposition that the defendant would be bound, but that not being referred to in *Simpson v. Fogo*, it could not be considered as dissented from.

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The Court of Appeal held, in *re the St. Nazaire Co: Limited, ex parte the European Bank*, that the St. Nazaire Company, having appeared to protest against the jurisdiction of the French court, were so far bound, as to be precluded from setting up that the judgment had been obtained irregularly.

*Gen: Navigation Co: v. Guillon.*  
13 L. J. Ex: 168.

*re St. Nazaire Co: ex p: European Bank.*  
36 L. T: 358 [on app:]  
37 L. T: 52.

Lord Blackburn's opinion however seems to have leant very strongly in the opposite direction; for during the argument in *Duflos v. Burlingham* his attention having been drawn to the fact that the defendant had not alleged non-appearance to the suit, he remarked, 'He says he never owed allegiance to the country. 'Besides how could his appearance have rendered the judgment 'binding upon him under the circumstances stated?'

*Duflos v. Burlingham.*  
34 L. T. 688.

If there was really any doubt on the question of jurisdiction, when the defendant appeared he could have at once raised a declinatory plea raising the question and the court would have determined the question: to raise it again in this country would be against the principle of appeal: if he did not raise it, then the fault is his own, and the case falls within the other principle already considered [page 102] that a new defence will not be entertained.

The question should have been raised abroad.

This is the principle of the decisions in *Edwards v. Warden* and *Oulton v. Radcliffe*. In the latter case however Brett, J., declared it would not apply to cases where the court had no jurisdiction over the subject and nature of the action. Where therefore the rule of territorial jurisdiction has been broken and a judgment given in respect of land situate in a foreign country, the defendant's voluntary appearance will not cure the defect.

Appearance does not give jurisdiction where there is none by international law.

*Edwards v. Warden.*  
L. R. 9 C. P. 189.  
*Oulton v. Radcliffe.*  
1 App: ca: 281.

But this rule, being based on the exclusiveness of territorial sovereignty must be strictly limited to cases of exclusive jurisdiction: where there is concurrent jurisdiction, any doubt as to the propriety of that court entertaining the suit before which it is brought, will be at once set at rest by appearance. (*Orr-Ewing v. Orr-Ewing*.)

The rule limited to cases of exclusive jurisdiction. [cf. pp. 67, 74.]

*Orr-Ewing v. Orr-Ewing.*  
8 App: ca: 456 [on app:]  
9 App: ca: 34.

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An important question arises as to the form in which the plea to the jurisdiction should be raised in this country.

The way in which the question of jurisdiction should be raised in England.

*Cookney v. Anderson.*  
1 D. J. & S.  
365.  
*Orr-Ewing v. Orr-Ewing.*  
8 App. ca:  
456.

In *Cookney v. Anderson*, Lord Westbury, C., said that the proper course was for the defendant to appear and afterwards move to set aside the writ, or demur: and in *Orr-Ewing v. Orr-Ewing*, Cotton, L.J., said that there was an opportunity if the defendants thought fit of appearing conditionally and moving to discharge the order for service.

The two courses pointed out by the Rules of Court 1883, would seem to be: under Order XII, rule 30, to move the court to set aside the writ or service, without entering or obtaining an order to enter a conditional appearance: or, under Order XXV, rule 2, to raise the question of jurisdiction as a point of law by his pleading.

O. xii. r. 30.

O. xxv. r. 2.

In admiralty cases an appearance under protest is as correct a method of raising the question as a motion to set aside the writ. (James, L.J., *The Vivar*.)

Appearance under protest.

*the Vivar.*  
2 P. D. 29.

These being the English rules binding foreigners, it seems impossible to contend that similar rules in a foreign country are not equally binding on English subjects: and therefore there is very little doubt that the effect of appearance is to settle once and for all the question of jurisdiction.

Indeed the difficulty seems much exaggerated. We have already discussed the question of Territorial Jurisdiction; if property, whether real or personal, situate in a foreign country is seized either to found jurisdiction or as security, or is liable to be seized in execution in the event of the defendant being unsuccessful, it can only be so seized in accordance with the law of the country. If the seizure by a Court of First Instance is invalid according to that law, an appeal lies to the Supreme Courts of the country and the decision there must be presumed to be in accordance with the law. If we are to imagine a seizure of property which is illegal by the laws of any country, and yet is sanctioned by its highest tribunal, the remedy is beyond the jurisdiction of the courts, and must be sought through the medium of the Foreign Office.

The difficulty is exaggerated.

An appearance which is said to be an appearance only in order to save property seems to be a specious way of saying that the suit was defended in order to save the property by shewing it to have been wrongfully taken according to the law of the country, in other words that the defendant appeared to the suit in the ordinary course and was defeated. The distinction that has been

Real meaning of such a defence.



drawn is therefore, we venture to think, not only unsubstantial but unsound.

*General consideration of the Defence.*

The defence  
raising the  
defendant's  
absence.

Having devoted so much space to the question of Jurisdiction in all its different aspects, the last step, the discussion of the defence itself, would seem to be a comparatively simple one. There are however a considerable number of cases in which, the absence of the defendant having been raised, the subject of Jurisdiction has been partially considered, and to these we must now turn our attention.

And first there are to be found some very broad general statements, or rather declamations, which if they were to be accepted without reserve would be very misleading: such for example as that of Lord Ellenborough, C.J., in *Buchanan v. Rucker*:—‘It is ‘contrary to the first principles of reason and justice, that in ‘civil or criminal cases a man should be condemned before he is ‘heard.’

*Buchanan  
v. Rucker.*  
9 East 192.

Form of  
plea.

The general form of the plea is somewhat as follows:—that at the time of the commencement of the suit, and thence down to its termination the defendant was absent from the country: that he was not summoned to appear in, nor had he any notice or knowledge of any of the proceedings. On this, as on every other point, the old cases are far from satisfactory, even when they are freed from cumbrous technicalities, on account of the conflicting principles contained in them. In *Buchanan v. Rucker* and *Cowan v. Braidwood* it was held that absent defendants could not be affected by the laws of a country unless they had once been in it:—‘By persons absent from Tobago, must necessarily be meant ‘persons who have been present within the jurisdiction.’ In the former case the Chief Justice rested his judgment on the broad ground that laws passed by one country were not obligatory on foreigners not subject to their jurisdiction: his exclamation ‘Can ‘the Island of ‘Tobago pass a law to bind the rights of the whole ‘world?’ was, as we have seen, long afterwards approved and made the basis of one of the arguments in *Schibbsy v. Westenholz*, which was followed in *Rousillon v. Rousillon*. The same principle is laid down in *Gauthier v. Blight*, [Upper Canada]: and is adopted by Story:—‘There is no pretence to say that such modes of proceeding can confer any legitimate jurisdiction over foreigners ‘who are non-residents, and do not appear to answer the suit, ‘whether they have notice of the suit or not. The effects of all

Cases in  
favour of  
plea.

*Cowan v.  
Braidwood.*  
1 M. & G.  
882.

*Schibbsy v.  
Westenholz.*  
L. R. 6  
Q. B. 155.  
*Rousillon v.  
Rousillon.*  
17 Ch. D.  
351.  
*Gauthier v.  
Blight.*  
5 C. P. 122.

Story,  
§ 546.



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*Ferguson v. Mahon*,  
11 A. & E.  
179.

'such proceedings are purely local: and elsewhere they will be held to be mere nullities' [Conflict of Laws, § 546]. In *Ferguson v. Mahon*, Lord Denman, C.J., held that a plea 'that defendant was never served with, nor had notice of, any process in the action' was good; and that a reply, 'that the defendant had notice of a writ of summons issuing out of the court in which judgment was obtained, for the cause of action on which such judgment was obtained,' was insufficient and clearly bad; but the reason given was that it did not shew that the process was at the suit of the plaintiff or was in the action.

*Douglas v. Forrest*,  
4 Bing: 686.

The key to these decisions is to be found in the case of *Douglas v. Forrest*, which has already been noticed as laying down the principle that an absent defendant may be summoned to the country for debts contracted within it; the argument being that he could not have contracted the debt sued for unless he had been in the country, and therefore he could only be sued when the absence followed a presence in the country. But the case is, as we have seen, a decision against the validity of the defence. Owing to these decisions however 'absence of notice' has been generally included in the lists of defences to which reference has been made, notably in the case of *Ochsenbein v. Papelier*. [cf: p. 159.]

*Ochsenbein v. Papelier*,  
L. R. 8  
Ch: 695

There seems nevertheless to have grown up a confused kind of notion that, if the defendant *knew* of the action, however irregular the notice, he ought to have appeared, even if the cause of action did not warrant that notice. Thus in *Cowan v. Braidwood*, Tindal, C.J., said, 'Again there is no statement that the defendant had no knowledge or notice of the proceedings. It is averred, in a very technical and artificial manner, that they were not notified to him "according to the course and practise of the court." That may mean that he had no such notice as he ought in strictness to have had; but it is very far from alleging that he had not notice of the proceedings. And the next statement in the plea still leaves it open that he might have had notice, so as to enable him to apply to the court.' This doctrine has been

Knowledge  
of the action.

*Cowan v. Braidwood*,  
1 M. & G.  
882.

*Montreal Co. v. Cuthbertson*,  
9 Q. B. 78.

perpetuated in a case in Upper Canada, *the Montreal Mining Co. v. Cuthbertson*:—'The defendant should have denied knowledge of the action. He may have accepted declaration without process, or the proceedings in the foreign court may not be commenced as in ours by any writ' (Robinson, C.J.). This accounts for the presence of the word 'knowledge' in the plea.

This principle of knowledge forms as it were the link between the two extreme views. Maule, J., declared that 'the courts at

'Westminster in sustaining decrees of foreign courts against  
'absent persons have decided that in their judgment a decree  
'may not be contrary to natural justice although made against  
'a party who is absent; for absence alone is not sufficient to  
'invalidate the proceedings.'

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Cases in  
which plea  
rejected.

In *Becquet v. McCarthy* and *Reynolds v. Fenton* the plea was rejected. That it is bad may also be inferred from *Don v. Lippman* and *Meeus v. Thellusson*. The whole question was put on a very clear footing by Wigram, V.-C., in *Henderson v. Henderson* in the judgment already quoted on the subject of error in procedure [p. 128]; it will be noticed that his remarks apply not only to irregularity of service but also to absence of service, the argument resting entirely on the principle of error. In *Maubourquet v. Wyse*, the defence was held to be bad, because the defendant might have been resident, or had property, or might have been served through an agent. These last two reasons however do not seem sound.

*Becquet v. McCarthy.*  
2 B. & Ad.  
951.  
*Reynolds v. Fenton.*  
16 L. J.  
C. P. 15.  
*Don v. Lippman.*  
5 Cl. & F. 1.  
*Meeus v. Thellusson.*  
22 L. J. Ex.  
239.  
*Henderson v. Henderson.*  
3 Hare 100.  
*Maubourquet v. Wyse.*  
1r. Rep.  
1 C. L. 471.

Service on  
agent of  
absent  
defendant.

[cf: p. 134.]

The existence of property in a country does not, as we have seen, of itself import a necessary obedience to the writ of summons out of the jurisdiction. And with reference to service on the agent of an absent principal it is somewhat curious that it is not now recognised by English law, unless of course he be specially authorised to accept service, although it seems once to have been allowed in the extension of outlawry noticed earlier in this section. It is however to be found in many of the colonial statutes: and in accordance with what has already been said, it is presumed that if such were the law of the country, whence a judgment in an action commenced in accordance with it emanated, the judgment would be recognised and enforced in this country against the principal.

The American courts have already adopted this principle, holding that where a foreign law provides that under certain conditions service on an agent shall be equivalent to service on the defendant himself, 'there is nothing in this unreasonable in itself or in conflict with any principle of public law. For it cannot be deemed unreasonable to secure to citizens a remedy in their 'domestic forum' (*Lafayette Insurance Co. v. French*—New York).

*Lafayette Ins. Co. v. French.*  
18 Howard  
404.

Absence  
may be  
intentional  
or un-  
intentional.

It is evident that this absence may be of different kinds: it may be at the commencement of the suit, or it may be during its continuance: as we have seen, it is quite unimportant in the latter case. With regard to the former it may be intentional or unintentional, but this distinction so far as the construction of

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Order XI is concerned makes no difference, one of the reasons for the existence of that order being to remedy the hardship and expense occasioned to creditors by intentional absence. But whether the absence be intentional or unintentional the regularity of the service by a foreign court cannot be questioned in another country.

Regularity  
of service  
cannot be  
questioned.

It seems also to have been considered possible that the defendant's absence may be unintentional, not because the foreign law did not require the summons or notice to be served personally, but because the suit, contrary to the provisions of the foreign law, began without any summons or notice at all. This however hardly requires our serious attention.

We have dealt here with the principles only of Order XI. The subject will reappear when we come, under the head of 'Natural Justice,' to consider whether in reality any power exists of reviewing the inherent justice or injustice of the foreign law; and again when we deal with the practice under the order in chapter viii, on 'Service out of the Jurisdiction.'

We have now concluded the consideration of the numerous points raised under the three main heads of defence—Fraud, Error, and Jurisdiction. There remain three other heads; that the judgment is a violation of Natural Justice, International Law, and Public Law. But it will be seen at once that the two groups differ very materially in their nature; the first three are specific, while the remaining three are general.

## IV. NATURAL JUSTICE.

That the judgment of, or that the proceedings in the foreign court were contrary to the principles of natural justice is a sweeping accusation which was formerly much resorted to as a defence, and is even now to be met with. And there is an opinion to be found very generally expressed by learned judges to the effect that the court will entertain the question; and that, if the allegation is proved, and it is made apparent that the enforcing of the judgment would be against the principles of natural justice, effect will not be given to it. At the same time however the presumption is always declared to be the other way. Thus, in *Buchanan v. Rucker*, Lord Ellenborough, C.J., said:—'The presumption may be in favour of a foreign

Against  
natural  
justice.

Old opinion  
of defence  
'against  
Natural  
Justice'

*Buchanan v.  
Rucker.*  
9 East 192.

'judgment, if it appears on the face of it consistent with reason and justice': And Lord Kenyon, C.J., in *Calvert v. Bovill*:— 'We presume the foreign sentences are just.' So also, in *Cowan v. Braidwood*, Maule, J.:— 'A decree of a foreign court of competent jurisdiction must be presumed not to be against natural justice.' But this favourable presumption once removed, the question at issue between the parties would be treated as if it had never been considered before. Thus, in *Price v. Dewhurst*, Shadwell, V.-C., said:— 'The question is whether this is not contrary to the common course of justice'— 'Wherever it is manifest that justice has been disregarded, the court is bound to treat the decision as a matter of no value and no substance.'

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*Calvert v. Bovill.*  
7 T. R. 523.  
*Cowan v. Braidwood.*  
1 M. & G. 288.

*Price v. Dewhurst.*  
8 Sim: 279—  
302.

too wide to  
be of practical  
utility.

But it is at once apparent that this proposition is too large and too unwieldy to be of much practical service: So much would apparently be included in it that it would be impossible to draw the lines of definition. The consequence of this is that in the later cases the proposition has been narrowed so as to refer exclusively to a departure from natural justice in the proceedings of the foreign court. Thus in *Henderson v. Henderson*, Lord Denman, C.J., said:— 'That injustice has been done is never presumed, but the contrary; unless we see in the clearest light that the foreign law, or at least *some part of the proceedings* of the foreign court are repugnant to natural justice.' And Watson, B., in *Sheehy v. the Professional Life Assurance Co*:— 'We can't enquire into *the proceedings* of another court, except so far as we can see that they are contrary to natural justice.'

*Henderson v. Henderson.*  
13 L. J.:  
Q. B. 274.

*Sheehy v. Professional Ass: Co.*  
26 L. J.:  
C. P. 301.

The proposition  
narrowed by  
*Bramwell, B.*

Finally, Bramwell, B., has reduced the proposition as to 'proceedings,' within what we venture to think are its proper and convenient limits:— 'What this natural justice is,' he says in *Crawley v. Isaacs*, 'refers rather to the form of procedure than to the merits of the particular case. English courts will not be concluded by proceedings not in accordance with natural justice: the remedy being given here because it would be useless to complain to the foreign court; whereas if in accordance with natural justice, the foreign court would itself interfere to prevent the plaintiff taking advantage of the judgment irregularly and improperly obtained.'

*Crawley v. Isaacs.*  
16 L. T.  
529.

The discretion  
vested in  
every state  
to make  
laws which  
must affect  
absent  
foreigners  
[cf. p. 157].

When we were dealing with the defence attacking the jurisdiction of the foreign court, we hinted that although there must be a discretion vested in the legislature of every country to make laws which include in their operation certain absent foreigners, yet, on account of this discretion having been accorded, there

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must also be a corresponding right in other states whose subjects are affected, of supervision over the exercise of it. Although of course purely a theoretical hypothesis, Baron Bramwell's proposition, which is rendered still more clear by his judgment to be referred to presently, seems exactly to fit in with it. And for this reason: the old broad proposition arrogated to our courts a right to enquire into *all* the laws of the foreign state, or rather any one law on which the judgment had proceeded, and this quite irrespective of other elementary considerations, such as the presence of the defendant within that state. But limited in the way in which Baron Bramwell suggested, it becomes simply a right to enquire into *the one* law regulating the proceedings in the foreign court by which the defendant has been affected; or practically, in other words, that one law deciding the cases and the manner in which an absent defendant shall be summoned to the courts of the country. Again, if it were not so limited, the almost hopeless vagueness of the term Natural Justice, and the double method of its application, would render it impossible to be dealt with: for at one time it is put forward as a *reason* for the validity of any defence raised, and at another time as a defence itself. For instance, it is said that fraud must be a good defence, not only *quâ* fraud, but because it would be contrary to natural justice to enforce a judgment obtained by fraud.

Result of  
limitation to  
proceedings.

Double  
application  
of term  
natural  
justice.

*Ochsenbein*  
*v. Papelier*.  
L. R. 8  
Ch: 695.

Thus Mellish, L.J., in *Ochsenbein v. Papelier*:—‘It has never been doubted that a foreign judgment could be impeached at law as being contrary to the principles of natural justice: *e.g.* no notice; want of jurisdiction; or fraud.’

*Messina v.*  
*Petrocchino*.  
L. R. 4  
P. C. 144.  
*Shaw v.*  
*A.-G.*  
L. R. 2  
P. & D. 156.

In *Messina v. Petrocchino*, ‘wanting in the conditions of ‘natural justice’ is included in the list of defences: and in *Shaw v. the Attorney-General*, Lord Penzance said:—‘Besides being bad for want of jurisdiction, this judgment has the incurable vice of ‘being contrary to natural justice.’

Were we therefore to admit the broad doctrine, that ‘contrary to natural justice’ is a good defence, we should find a ready answer whenever the question is raised whether a defence be good or bad: For example;—The foreign court has based the judgment which is sought to be enforced, say, upon a misconception of English law, which law it professed to take for its guidance, and which it interpreted, according to its lights, wrongly. Surely, the defendant might say, it is contrary to the principles of natural justice—contrary to the common course of justice—contrary to the eternal and immutable principles of justice—inconsistent with

Appeal to  
‘the eternal  
principles of  
justice.’



reason and justice—to enforce such a decision in the English courts. But we have seen that the principles acted upon by our courts, require such a decision to be recognised and enforced; and that for the reason that by the Comity of Nations the English court will not constitute itself a Court of Appeal from the foreign court.

Cases do  
not support  
its argu-  
mentative  
use.

Therefore in this its argumentative form, actual decisions have exposed the fallacies and inaccuracies involved in the defence, and have left the defences in support of which it is advanced to be dealt with on their own merits. We feel justified therefore in confining ourselves strictly to the case in which it appears as a defence properly so called, the form of which is, ‘that the proceedings in the foreign court were contrary to natural justice,’ prefacing our enquiry with some further remarks of Baron Bramwell in *Crawley v. Isaacs* :—‘It is clearly contrary to natural justice in ‘one sense that a judgment should be enforceable when there ‘was no cause of action, and yet it is clear that that is no defence ‘to an action on the judgment. Does not that show that the term ‘is used with respect to a foreign judgment in reference to the ‘conduct or mode of procedure of the foreign court, rather than ‘the merits of the particular case?’—‘If this were the case of a ‘judgment obtained by reason of untrue statements contained in an ‘affidavit in a foreign court where the procedure is contrary to ‘natural justice we might refuse to give effect to that judgment; ‘but if the procedure be not contrary to natural justice the ‘defendant has a remedy by an application to the foreign court ‘to get the proceedings set aside; so that in all cases there will be ‘a remedy. If the proceedings be in accordance with the practice ‘of the foreign court, but that practice is not in accordance with ‘natural justice, this court will not allow itself to be concluded ‘by them, but on the other hand; if the procedure be in accord- ‘ance with natural justice, the foreign court itself will interfere ‘to prevent the plaintiff taking advantage of the judgment irregu- ‘larly and improperly obtained. Of course in the case of the ‘procedure being contrary to natural justice it would be useless ‘to go to the foreign court to complain of its being so.’

*Bramwell,*  
*B.*

*Crawley v.*  
*Isaacs.*  
16 L. T. 529.

Instances of  
plea being  
held bad.

Following this principle, Martin, B., in *De Cosse Brissac v. Rathbone*, held a plea bad, which alleged that the foreign judgment was erroneous in fact and in law on the merits, and that the enforcement of the judgment in England would be contrary to natural justice: and in *Alivon v. Furnival* the defence ‘against natural justice’ was raised, it being suggested that a certain

*Brissac v.*  
*Rathbone.*  
30 L. J:  
Ex: 238.

*Alivon v.*  
*Furnival.*  
1 D. P. C.  
614.

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*Cammell v. Sewell.*  
29 L. J.  
Ex: 350.

award was not warranted by the submission to arbitration. Parke, B., said :—‘It is impossible for us to say that this principle ‘of adjusting damages is wrong as being contrary to natural ‘justice.’ So Crompton, J., in *Cammell v. Sewell* :—‘It does not ‘appear to us that there is anything so barbarous or monstrous in ‘the law, that we can say that it should not be recognised by ‘us.’ And Cockburn, C.J. :—‘There is a good contract of sale in ‘Norway without any evidence to show that by the general law of ‘nations the sale valid in Norway can be invalidated elsewhere.’

But although we have arrived at a more precise principle we still have to face the old difficulty arising from the vagueness of the term Natural Justice. If a judgment may be discarded because it has been obtained by means of a procedure which violates justice, it is very evident that we must have some standard of just procedure by which the foreign law and decision may be criticised. As Austin points out in a passage already quoted [p. 10], a rule ‘which assumes that the judge is to enforce morality, ‘enables the judge to enforce just whatever he pleases;’ and unless there be such a recognised standard, every judge must make one for himself.

Difficulty  
of arriving  
at a standard  
of justice.

As we have pointed out, the defence is now really narrowed to the question of ‘assumption of jurisdiction’ over absent defendants, and its consequence ‘service out of the jurisdiction;’ but the laws with regard to these questions vary in every state, each one proceeding on its own notion of justice: and it would be arrogance to assume that English law is to be the standard, even putting aside the important consideration that it is considerably in advance of the laws of other states. It is therefore necessary to devise some other rule.

*Simpson v. Fogo.*  
32 L. J.  
Ch: 249.

In *Simpson v. Fogo*, Wood, V.-C., shadowed forth the outline of such a rule :—‘If you find a course of procedure there which is ‘not recognised by any other country in the civilised world, our ‘own citizens must be protected from the loss of their property ‘which would be inflicted by decisions so arrived at.’

And consequently of settling any rule.

*Liverpool Cr: Co: v. Hunter.*  
L. R. 3  
Ch: 479.

In the *Liverpool Marine Credit Co: v. Hunter*, it was argued, that a creditor having pursued the property of his debtor to a foreign country where he knew that the rights of a third person in that property would not be regarded, and that law having so disregarded those rights, the judgment was unjust and ought not to be enforced. Lord Cairns, C., said :—‘The Louisiana law does not ‘recognise the transfer of chattels without delivery. In the argument, the law of Louisiana was treated as being itself contrary to

‘natural justice : there is no such inherent injustice as absolutely to disentitle it to regard when brought into question here. It is the application of the law to foreigners and the refusal to recognise their title to chattels—a title which is valid and complete in their own country—unless the property is accompanied with possession, which renders, not the law itself, but the decisions of the courts of Louisiana upon it open to the reproach of ‘injustice.’ The application to restrain proceedings in the courts of Louisiana was refused [see p. 67]; the judgment of the Lord Chancellor however is hardly sufficiently strong to warrant the inference that a judgment proceeding on such law would be disregarded.

Again, in *Fletcher v. Rodgers*, Brett, L.J., took it for granted that by the Californian law jurisdiction is assumed over absent defendants in all actions by seizure of their property within the country ; such a law being, as we have seen, at variance with the laws of most states : yet it was unanimously declared by the Court of Appeal that this assumption of jurisdiction was not contrary to natural justice. This is perhaps as strong a case as can well be imagined. Variation between the law of the state and the unanimous law of other states was therefore not accepted in these two cases as the test whether justice had been violated or not : and we therefore have arrived no nearer the standard which we sought ; we have only found this principle that, in the case of the law referring to assumed jurisdiction over absent defendants, although the power of review is admitted to exist, the exercise of it will be avoided as much as possible.

*Fletcher v. Rodgers.*  
27 W. R. 97

[cf. pp. 67,  
45.]

Variation between the law and that of all other states is not the test. The exercise of power of review avoided as much as possible.

The foreign process has been criticised.

Case of an alien enemy.

When however we come to the artificial method of citation, the service of the writ out of the jurisdiction, we do find cases in which the foreign process has been severely criticised, as not affording sufficient notice of the action to the absent defendant. These have already been noticed under the head of absence. To them must be added *Don v. Lippman*. The appellant was an alien enemy, and could not for this reason appear in the French courts. The notice of citation was affixed in a public office, presumably in accordance with French law. Lord Brougham refused to enforce the French judgment, ‘because the defendant ‘was by force kept out of the action.’

*Don v. Lippman.*  
5 Cl. & F. 1.

Nevertheless in a few cases an opinion is to be found similar to that expressed in *Fletcher v. Rodgers* against reviewing the foreign process : Thus in the *Bank of Australasia v. Harding*, Maule, J., said :—‘You insist here on the absence of notice of

*Bank of Australasia v. Harding.*  
19 L. J.  
C. P. 345.

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*Becquet v. McCarthy.*  
2 B. & Ad:  
951.

‘process: but there is nothing in that contrary to natural justice, ‘if there has been some other kind of notice: for example, a ‘proclamation, or verbal notice.’ So in *Becquet v. McCarthy*, Lord Tenterden, C.J., held that the court could not take upon itself to say that the law of procedure by which the action had been commenced was so contrary to natural justice, as to render the judgment void. And this decision was in the case where there was ‘a deficiency in the law of Mauritius in not requiring the ‘Procureur-Générale to communicate with the absent defendant’: and again in *Reynolds v. Fenton*, Maule, J., said:—‘For aught we ‘can tell the proceedings of the Court of Brussels may be regularly ‘commenced by mere verbal notice without any regular process.’

*Reynolds v. Fenton.*  
16 L. J:  
C. P. 15.

*Meeus v. Thellusson.*  
22 L. J:  
Ex: 239.

And it is to be inferred from the argument in *Meeus v. Thellusson*, that a judgment after process served, according to Belgian law, at the elected domicile of the acceptor of a bill of exchange, although absent from the country, would be recognised in England.

The subject of Service out of the Jurisdiction will be considered more fully in chapter viii: only a general remark on the subject is here necessary.

It can easily be understood how difficult it is to deal with a defendant who is not within the territory of the country, and that some protection must be afforded to plaintiffs in the country. That the protection thus afforded by the State to its subjects should be very materially in the plaintiff’s favour is not unreasonable, though at first sight it may appear arbitrary.

The difficulty in protecting plaintiffs against absent defendants.

In the case of the French process it might be said that the time given to the defendant should be lengthened; that instead of one month, it should be six months or even a year, but that is a matter which is within, and must be left to, the discretion of the legislature passing the Statute.

Shortly therefore the result seems to be this, that both as to the law regulating the assumption of jurisdiction, and as to the law of procedure, the English courts will be chary of exercising their power of review. But owing to the uncertainty arising from contrary decisions, we venture to formulate the following rule, which forms a sequel to that enunciated on p. 130: So long as the discretion is exercised not unwisely, nor unreasonably, the courts of this country will bow to the authority and jurisdiction which is claimed and exercised by foreign law over English subjects who are declared by foreign courts to be subject thereto:

General result.

Rule deducible.

Not making reciprocity a condition, but expecting a reciprocal recognition of similar English laws and decrees.

This rule supposes therefore a power existent in all courts of judging whether the discretion has been exercised, not wisely and reasonably, but, not unwisely and unreasonably ; and also that all courts, in their wisdom, will not overstep the limits of this power.

## V. INTERNATIONAL LAW.

Contrary to  
International  
Law.

The defence relying on a breach of International Law is frequently raised : but the field of enquiry which it suggests is as large and unwieldy as that opened by the defence just considered, ‘against natural justice.’ It has been found impossible to deal with it systematically, or to frame a general rule for the admission or rejection of the defence : we are only able to deal with isolated cases.

There is one class of cases—admiralty prize decisions—which do proceed on International Law ; the old cases indeed are declarations of that law : but these will be fully considered in chapter ix, on ‘Judgments *in rem*.’

The argu-  
mentative  
use of the  
defence as  
in the case  
of natural  
justice.

The defences raising the questions of jurisdiction, mistake as to the law applicable, and wilful error, are frequently sought to be established on the ground of violation of the Law of Nations : but it has been thought better to deal with them, as the courts have always done, on their own merits. A similar point arising in the subject of Divorce will in like manner be discussed when it arises.

With regard to jurisdiction however one point requires special attention here.

Defence  
good where  
judgment  
deals with  
land in  
foreign  
country.

We found that there was an universal rule that real property is governed by the law of the country where it is situated : and that a judgment of a foreign tribunal affecting it, even though it proceeded on an accurate interpretation of that law, would be liable to be disregarded in the courts of that country. This, as we have pointed out, is the invariable rule in all nations, and may therefore be regarded as a rule of International Law. This being so, the rule has now a wider significance : and it should follow that such a judgment would not be recognised in any other country : for instance, an Italian judgment affecting realty in France would not be recognised in England.

Has been  
applied to  
personality.

An extension of this real property doctrine to personality was made by Wood, V.-C., in *Simpson v. Fogo*. It was said to be an universal rule that the transfer of personal property is to be regulated by the law of the owner’s domicile, and therefore that a transfer valid by that law ought to be so regarded by the courts

*Simpson v.*  
*Fogo*.  
32 L. J.  
Ch: 249.



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of every other country where it is brought in question. But by the law of Louisiana with regard to the transfer of chattels there can be no title unless the property be accompanied by possession. In the case there had been no transfer of the possession : and the title, good by the law of the owner's domicil, was not recognised in New Orleans. The Vice-Chancellor refused to recognise the efficacy of the judgment, and in the *Liverpool Marine Credit Co. v. Hunter*, Lord Cairns, C., approved of the decision declaring it to be based on the total disregard of the Comity of Nations. This case is the only direct decision upon the question of violation of International Law, and the Vice-Chancellor's judgment contains a most elaborate argument in support of the position he took up.

*Liverpool  
Cr. Co. v.  
Hunter.*  
L. R. 3  
Ch: 479.

The Lord Chancellor's approval seems however to have been directed to the disregard of the law of Louisiana because it differed from those of other nations, rather than to the argument on the question of domicil by which the conclusion was arrived at. We have already pointed out [page 138] how the law applicable to personalty varies according to the nature of the action.

If it is possible to formulate a rule from this case it would seem to be the following. It is necessary first to establish clearly that the rule, the violation of which is alleged, is universal, and then the judgment will be disregarded. General rule.

*Debenedetti  
v. Morand.*  
J. D. I. P.  
1879, p. 72.

One other case is furnished by a decision of the Italian courts in *Debenedetti v. Morand* already referred to. There was, in the reasons appended to the judgment, an expressed incorporation of the *lex talionis*; the converse of the French law was substituted, with reference to a Frenchman, for the Italian law properly applicable. The same course would probably be pursued with reference to English subjects : and if the Italian courts, instead of proceeding on their own law as laid down in the Code of Civil Procedure, were to adopt the provisions of Order XI, then we venture to think that not only the English courts, but also the courts of any other country before which the judgment was in question, would be justified in accepting the defence that it was against International Law, and in refusing to enforce or recognise the judgment. [cf: p. 116.]  
  
Italian  
decision  
proceeding  
on  
*lex talionis*.

## VI. PUBLIC LAW.

It remains for us now to justify the statement made at the commencement of this chapter on Defences, with reference to public law. Contrary to public law.

It was stated that the necessity for admitting a principle of

The main principle of defence advocated [cf. p. 100] is now explained.

defence at all arose mainly from considerations of public law : it was pointed out that of the defences which might be raised to an action on a foreign judgment, the first group contained such only as would be defences in an action on the judgment in the country of its origin, and that this group was from its nature common to all systems of law : and of the second group, that such as we should find to be without doubt established, would properly be rested on the ground that the enforcement of the judgment would involve a violation of English public law ; or as it may also be expressed, would sanction something contrary to the policy of English law.

Now the established defences come under the heads of Fraud : Jurisdiction : Natural Justice : International Law. For our present purpose it is of no consequence that there is great divergence of opinion as to some of the divisions under these heads, for we need only deal with the main principle involved in each of them.

Review of defences. Those accepted are all grounded in public policy.

The penalty attached to fraud, whether of the person or of the court, of refusing recognition to the consequence of the fraud is admittedly part of the policy of our law : it is the only argument on which the defence has been rested.

The defence of absence of jurisdiction is admitted expressly on grounds of public policy for the protection of citizens from the law and process of foreign courts :

‘Against Natural Justice,’ even if it be not limited to the proceedings of the foreign court, rests on the same ground :

And ‘Contrary to International Law’ on the still wider ground of universal public law. We have therefore only left for our consideration the defence which itself raises the question of a violation of public law, or of the policy of English law : an example of this may be drawn from the recent case of *Rousillon v. Rousillon*.

*Rousillon v. Rousillon*.  
14 Ch. D.  
351.

Contract in restraint of trade.

The question had reference to a contract made abroad in restraint of trade in England. Fry, J., said, ‘It appears to me plain on general principles that this court will not enforce a contract against the public policy of this country, wherever it may be made. It seems to me almost absurd to suppose that the courts of this country should enforce a contract which they consider to be against public policy simply because it happens to have been made somewhere else.’

Foreign judgment on the contract.

But there had been a judgment given in France which condemned the defendant to pay damages in compensation for breach of the contract, and it was sought to enforce that judgment in this

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*Schibsby v.  
Westenholz.*  
L. R. 6  
Q. B. 155.

country : the learned judge refused to enforce it on the authority of *Schibsby v. Westenholz*, the defendant not having been resident in France at the time the action was commenced, and having been served with process only according to French law. [cf. pp. 158. 164.]

We must consider two important points which the adverse decision of this preliminary question rendered unnecessary at the trial. Admitting the principle with regard to such contracts to be as enunciated above, what respect should be paid to a judgment of a foreign court, (i.) enforcing the contract, (ii.) awarding damages for the breach.

Now, the contract being to be performed in England, it is governed by English law ; and the French courts in applying this law have mistaken, or omitted to consider, the policy of that law with regard to restraints of trade. But this as we have seen is no defence, and therefore unless another question be involved, unless the proviso in the principle of defence come in question, the judgment should be enforced. But to recognise the decree enforcing the contract would involve a direct violation of the policy of the English law, and therefore it would seem that such recognition should not be awarded to it : but whether the same considerations arise with regard to enforcing a judgment awarding damages for the breach of such a contract is a question by no means free from doubt.

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## CHAPTER V.

## INTERLOCUTORY PROCEEDINGS.

## Chapter V.

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## APPLICATION TO SIGN JUDGMENT UNDER ORDER XIV, IN AN ACTION ON A FOREIGN JUDGMENT.

In *Hubert v. Wallis* an application was made at Chambers by the plaintiff for leave to sign judgment under Order XIV; it being an action on a judgment of a French tribunal, affirmed by the Court of Appeal of the district. Field, J., refused to make an order, the defendant having in his affidavit raised the question of absence of notice. And in *Figuerou v. Hoch*, leave to defend unconditionally was refused on appeal from Chambers by the Divisional Court [Field and Bowen, JJ.].

*Hubert v. Wallis*, [not reported].

*Figuerou v. Hoch*, [not reported].

Application to sign judgment under O. xiv. in action on foreign judgment. Application of the general theory.

In a recent case—*Grant v. Easton*—the Court of Appeal have definitely decided that an action on a foreign judgment is within the terms of Order III, Rule 6, and therefore the plaintiff in such an action can obtain judgment under Order XIV.

*Grant v. Easton*, 49 L. T. 645.

From these cases it would appear that the application will be successful unless the defendant alleges one of the accepted defences in his affidavit in answer.

Now it is obvious that the only question involved is that decided by the Court of Appeal; is a foreign judgment 'a debt or liquidated demand in money payable by the defendant, with or without interest, arising upon a contract express or implied (as, for instance, on a bill of exchange, promissory note, or cheque, or other simple contract debt)'? The answer to this question flows from the

preliminary considerations contained in the first chapter. With Chapter V.  
 the greatest submission we venture to think that it is not. The old notion, as we have pointed out, was that there was a debt or implied contract on the foreign judgment *in this country*: this we have endeavoured to show is fallacious. But the debts to which Order III applies have not necessarily accrued in this country, but, subject to the defendant being within the jurisdiction, may have been contracted in any other country; because, as we have seen, the English courts entertain actions in respect of such debts.

The recent decision of C.A. examined.

The Court of Appeal considered however that the question had practically been settled by *Hodsoll v. Baxter*, in which it was held that in an action on a home judgment the writ might be specially indorsed: that an action on a judgment was an action of debt: and that no distinction could be made between a home and a foreign judgment. It is somewhat remarkable that the court should have thus recognised the illogical action on a home judgment: not only has the bringing of such an action been heavily penalised by the Act for the more effectual prevention of frivolous and vexatious suits (43 G. III c. 46. s. 4); but it fails to discriminate between a debt and a judgment debt, the latter being the judicial recognition of the former, giving thereby the right to enforce payment: strictly speaking, enforcement of a judgment must be taken as a short form of the more accurate expression, 'enforcement of the sanction correlative to the obligation which 'has arisen of obedience to the judgment.' We have already pointed out at length in the first chapter the important fundamental difference between the obligation which arises on a home judgment and that which arises on a foreign judgment.

*Hodsoll v. Baxter.*  
 28 L. J.  
 Q. B. 61.

The resemblance to an action on home judgment seems unsound.

The indorsement on the writ.

Moreover it is somewhat remarkable that in the forms for indorsements of writs of 'money claims where no special indorsement under Order III, rule 6,' the following occurs—'*Foreign judgment.*—The plaintiff's claim is £ upon a judgment of the Court, in the Empire of Russia.' It can hardly be said that the addition of the foreign money equivalent, and the date of the judgment would turn this ordinary into a special indorsement; and yet it is difficult to see what more could be required according to the forms given under Order III, bearing in mind the fact that the original cause of action should not be set out, because on first principles, the merits of the case cannot be gone into in the English court.

We have however already pointed out that some expeditious mode of obtaining the English judgment on the foreign judgment



**Chapter V.** should be introduced to save what is really the scandal of the expenses incurred under the present system. The introduction of the words 'foreign judgment' in the explanatory parenthesis in rule 6, would of course effect this. But even then it would hardly be dignified to relegate to a Master in Chambers the duty of issuing a decree to enforce the judgment of perhaps the highest tribunal of a foreign country. Although we could hardly adopt the French system of making this the province of a court of equal dignity with the foreign court, yet it seems to us that this duty should devolve, in the manner pointed out elsewhere, upon the Divisional Court. It is possible that the Master of the Rolls was influenced by this consideration, when he remarked that the decision of the Court of Appeal could not be a hardship, but rather the reverse. [cf. p. 103.]

## APPLICATION BY DEFENDANT FOR SECURITY FOR COSTS.

'The principle is well established that a person instituting legal proceedings in this country, and being abroad, so that no adverse order could be effectually made against him if unsuccessful, is by the rules of the court compelled to give security for costs' (Jessel, M.R., *re Percy Mining Co.*—Buller, J., *Pray v. Edie*). Security for costs to be given by absent plaintiff.

*re Percy Mining Co.*  
2 Ch. D.  
531.  
*Pray v. Edie*.  
1 T. R. 267.

In this respect no difference is made between an action on a foreign judgment and other actions: and this illustrates in a remarkable degree the hardship and injustice which result from our present procedure of compelling an action to be brought on the foreign judgment. The plaintiff has been successful in his action against the debtor abroad; possibly there may have been an appeal decided in his favour: the defendant however comes to this country, and if the plaintiff be resident out of the jurisdiction at the time when the action is brought on the judgment he is compelled to find security for costs; and in *Westenberg v. Mortimore* the court refused to rescind the order although the plaintiff (a foreigner) filed an affidavit that he had returned to England and intended to remain here until the settlement of the action. May be required in actions on foreign judgments.

*Westenberg v. Mortimore*.  
L. R. 10  
C. P. 438.

And this can be carried to any extent: as we have pointed out the action on the foreign judgment being considered as in no wise differing from any other action, and being therefore subject to all interlocutory incidents, applications to increase the security may be made as these incidents occur. In the unreported case we gave as an example—*Stein v. Cope*, [cf. p. 31] an alternative claim on the original cause of action having been made, a com-

*Stein v. Cope*  
[not reported.]

mission was issued to examine witnesses abroad; [see as to the issue of a commission, *ante* p. 120]; and applications were successfully made in Chambers for a large addition to the original security. It seems monstrous that the debtor, in addition to the delay and expense he has occasioned in prolonging the foreign suit, should have in his power this means of vexing and harassing his creditor.

We propose now to examine the subject of security at length.

## SECURITY FOR COSTS

### *On the ground of absence from the jurisdiction.*

The plaintiff's liability to give security for costs when out of the jurisdiction needs careful consideration. The first and main principle is that the security cannot be required from a plaintiff within the jurisdiction, although a foreigner, although his usual residence is abroad, and although he is about to go abroad: he must actually have left the country. (*Porrier v. Carter. Ciragno v. Hassan. Anon. Dowling v. Harman. Willis v. Garbutt.*) In other words an intention to reside here permanently is not essential (*Tambisco v. Pacifico*).

In *Redondo v. Chaytor*, a foreigner usually residing abroad came over to England for the express purpose of enforcing a claim by action. Thesiger, L.J., in an elaborate judgment reviewed a number of the old decisions, and the Court of Appeal unanimously (although Bramwell, L.J., thought the rule worked injustice) refused the order, expressing their opinion however that the plaintiff, if judgment were given against her, would leave the country 'under circumstances which would prevent the 'defendants from availing themselves of any process by which 'they could recover costs, and that by this means the very 'purpose of requiring the security would be avoided.' The same principle is laid down in *Cambottie v. Ingate*.

But in *Ainslie v. Sims* and *St. Leger v. Di Nuovo*, in which the circumstances of the plaintiff's residence here were identical with those in the case above mentioned, security was ordered; and in *Swanzy v. Swanzy*, Wood, V.-C., would also have granted the order, if the application had been made in time.

The general current of the cases therefore justifies the statement usually made that *Oliva v. Johnson* is no longer an authority. In that case the security was ordered because the plaintiff had not sworn that he resided, and intended to continue to reside, although he was resident and swore that he had no intention of

Main principle :  
Must have actually left the country.

Intention to reside permanently not essential

Residence for express purpose of carrying on action.

Overruled cases.

*Porrier v. Carter.*  
1 H. Bl.  
106.  
*Ciragno v. Hassan.*  
6 Taunt. 20.  
*Anon.* 8  
Taunt. 737.  
*Dowling v. Harman.*  
6 M. & W.  
131.  
*Willis v. Garbutt.*  
1 Y. & J.  
511.  
*Tambisco v. Pacifico.*  
21 L. J.  
Ex. 276.  
*Redondo v. Chaytor.*  
4 Q. B. D.  
453.

*Cambottie v. Ingate.*  
1 W. R. 533.  
*Ainslie v. Sims.*  
17 Beav. 57.  
*St. Leger v. Di Nuovo.*  
2 Sc. N. R.  
587.  
*Swanzy v. Swanzy.*  
27 L. J.  
Ch. 419.  
*Oliva v. Johnson.*  
5 B. & Ald.  
908.

**Chapter V.** leaving. So too the qualification in *Drummond v. Tillinghurst* cannot now be considered good law: the defendant swore that the plaintiff was a foreigner lately come to the country, with no connexions nor permanent abode, and was likely soon to leave it. Security was not ordered, because the defendant had not sworn to a permanent residence abroad. Lord Campbell, C.J., said that cases did not go beyond allowing security when the foreigner is in England but domiciled abroad.

*Drummond v. Tillinghurst.*  
16 Q. B.  
740.

But although it is now settled that security will not be ordered if the plaintiff, even in the case of a foreigner, is in the country at the time the application is made, it will be ordered if he afterwards leave it (*Nylander v. Barnes. Crispin v. Doglione.* ——— v. ———). This rule is also presumably applicable to subjects and aliens. But it is of course governed by what will be said hereafter on the subjects of temporary absence, and knowledge of the absence.

Will be ordered if he afterwards leave the country.

*Nylander v. Barnes.*  
30 L. J.  
Ex: 151.  
*Crispin v. Doglione.*  
1 S. & T.  
522.

——— v. ———  
2 Dicken:  
715.  
*Kemble v. Mills.*  
1 M. & G.  
565.

In *Kemble v. Mills*, after a demurrer had been set down for argument, the plaintiff went to reside abroad, and an application was made for security. The court decided that the demurrer should be argued first, because no further costs could be incurred; but that if judgment were given for the plaintiff on the demurrer, the action should then be stayed till he gave security.

It would seem that in all cases if once required, the order will not afterwards be rescinded on account of the plaintiff's return or after residence in this country (*Westenberg v. Mortimore*). But if security has not been given and the action has been stayed, it will be allowed to proceed on the plaintiff's return to this country (*Foss v. Wagner*). In *Kennedy v. Edwards* and *Charras v. Pickering*, however, where the security ordered had not been given, a motion to dismiss the action for want of prosecution was allowed. Where the return is only temporary it is of course liable to be again stayed on a further application for security.

Will not be rescinded on account of return.

Action will be stayed,

or dismissed.

*Westenberg v. Mortimore.*  
L. R. 10  
C. P. 438.  
*Foss v. Wagner.*  
2 Dowl: 499.  
*Kennedy v. Edwards.*  
11 Jur: 153.  
*Charras v. Pickering*  
39 L. J: Ch:  
190.  
*Hanmer v. Mangles.*  
12 M. & W.  
313.  
*De Marneffe v. Jackson.*  
13 Price 603.  
*Pray v. Edie.*  
1 T. R. 267.  
*Cambottie v. Ingate.*  
1 W. R. 533.  
*Ganesford v. Levy.*  
2 H. Bl: 118.

On the other hand it will be ordered and the action stayed until it is given, as of course, if the plaintiff is residing out of the jurisdiction (*Hanmer v. Mangles. De Marneffe v. Jackson. Pray v. Edie*); and this whether the plaintiff is a subject or an alien (*Cambottie v. Ingate*); and nothing more than the residence abroad need be shewn (*Ganesford v. Levy*).

The use of the word 'residing' brings us to the second principle. Security will not be ordered if the plaintiff has merely gone out of the country for a short time, his permanent residence being

Will not be ordered if absence is temporary.

here. (*Cole v. Beal. Hobbs v. Hitchcock. Anon.; Kerr v. Gillespie.*) Chapter V.  
 'He might be on a pleasure tour in vacation' (Littledale, J.,  
*Frodsham v. Myers.*) 'It was never understood that a party's  
 'going to Spa, or Lisbon for his health, to Holland, etc. upon  
 'business, or engaging himself with a sailing party to see the Rock  
 'of Gibraltar, etc., was that kind of living abroad that would  
 'warrant such an application' (Lord Thurlow, C., ——— v.  
 ———).

Residence  
abroad must  
be shewn.

It lies therefore on the defendant to show that the plaintiff has  
 not gone abroad for a temporary purpose (Alderson, B., *Hanmer*  
 v. *Mangles*); that is, his residence abroad must clearly appear from  
 the absence of *animus revertendi*. (*Green v. Charnock. Elan v.*  
*Rees.*)

Thus in *Taylor v. Fraser* the order was refused because it  
 appeared that the plaintiff was expected to return shortly; and in  
*Boustead v. Scott* it was also refused although it was shewn that  
 the plaintiff had been out in Sierra Leone for three months past.  
 But in *Wells v. Barton* permanent residence abroad of a British  
 subject was assumed from the fact of the suit not having been  
 commenced for a year after the plaintiff had left the country.  
 And in *Foss v. Wagner* where the court was satisfied that the  
 plaintiff (suing *in formâ pauperis*) would not return for eighteen  
 months, the action was ordered to be stayed unless security could  
 be found.

But the  
absence  
must  
really be  
temporary.

This qualification of the rule was approved by Lord Cran-  
 worth, L.J., in *Blakeney v. Dufaur*:—'If the plaintiff were gone  
 'abroad for some object which would keep him there ten years,  
 'or if it were improbable that he could return within the time  
 'within which he is likely to be called upon for costs in the suit  
 'he must give security.' Thus security may be ordered although  
 the *animus revertendi* exist.

In *Gurney v. Key, Naylor v. Joseph and Mahon v. Martinez*,  
 security was ordered there being permanent residence abroad and  
 only occasional residence here. It is presumed that the plaintiffs  
 were absent at the time the applications were made.

Examples.

On the same principle the application was refused in *Frodsham*  
 v. *Myers* and *O'Lawler v. Macdonald*, where the plaintiffs were  
 British subjects who had volunteered into foreign service, and  
 no intention of remaining permanently in that service was shewn.  
 And again in the case of seamen, whether British or foreign,  
 serving on British ships. (*Henschen v. Garves. Ford v. Boucher.*  
*Jacobs v. Stevenson. Nelson v. Ogle.*)

*Cole v. Beal.*  
7 Moore 613.  
*Hobbs v. Hitchcock.*  
5 Ves: 699.  
*Anon.*  
2 Chit: 152.  
*Kerr v. Gillespie.*  
7 Beav: 269.  
*Frodsham v. Myers.*  
4 Dowl: 280.  
—— v. ——  
2 Dicken:  
775.  
*Hanmer v. Mangles.*  
12 M. & W.  
313.  
*Green v. Charnock.*  
1 Ves: 396.  
*Elan v. Rees.*  
3 Doug: 382.  
*Taylor v. Fraser.*  
2 Dowl: 622.  
*Boustead v. Scott.*  
2 Dowl: 622.  
*Wells v. Barton.*  
2 Dowl: 160.  
*Foss v. Wagner.*  
2 Dowl: 499.  
*Blakeney v. Dufaur.*  
2. D. M. &  
G. 771.  
*Gurney v. Key.*  
3 Dowl: 559.  
*Naylor v. Joseph.*  
10 Moore  
522.  
*Mahon v. Martinez.*  
4 Moore 356.  
*Frodsham v. Myers.*  
4 Dowl: 280.  
*O'Lawler v. Macdonald.*  
8 Taunt:  
736.  
*Henschen v. Garves.* 2  
H. Bl: 283.  
*Ford v. Boucher.*  
1 Hodges 58.  
*Jacobs v. Stevenson.*  
1 B. & P. 96.  
*Nelson v. Ogle.* 2  
Taunt: 253.



**Chapter V.** This rule was however not adopted by Romilly, M.R., in *Stewart v. Stewart*—nor will it apply to seamen on board foreign ships : in such cases the rule in *Nylander v. Barnes* [*supra* p. 187] will be followed (*the Franz et Elize*). In the *Don Ricardo* however Sir R. Phillimore held that the matter was in the discretion of the court, and refused to order security from the mate of a foreign vessel, although he was a native of Germany with no fixed residence or property in this country.

*Stewart v. Stewart.* 20 Beav: 322.  
*Nylander v. Barnes.* 30 L. J: Ex: 151.  
*the Franz.* Lush: 377.  
*the Don Ricardo.* 5 P. D. 121.

From these cases it is apparent that the proof of permanent residence abroad in the case of an English subject is attended with great difficulty ; although absence of *animus revertendi* and the probability of a long sojourn abroad may be inferred at an early stage from the facts of the case. Thus in *Blakeney v. Dufaur* it was proved that the plaintiff was keeping out of the way to evade enquiries : that he went to Jersey in the month of June and had not returned. Security was ordered in November, the court holding that there was no other inference to be drawn but that he had gone out of the kingdom permanently. There are two cases in which permanent residence in this country by a foreigner has been raised. In *Durell v. Mattheson* the plaintiff was a foreigner who was in the habit of residing here four months in the year ; he was absent on board his yacht ; the order was refused. And in *White v. Greathead*, the plaintiff originally resided in the West Indies : he came to reside here with his family : he then went back to the West Indies to arrange his affairs, and on his filing an affidavit of his intention to return, (and consequently to reside permanently in this country) the order for security was refused.

*Blakeney v. Dufaur.* 2 D. M. & G. 771.

*Durell v. Mattheson.* 3 Moore 33.

*White v. Greathead.* 15 Ves: 2.

Probability of prolonged absence may be inferred.

Permanent residence of foreigner in England.

*Naylor v. Joseph.* 10 Moore 522.

It would appear from *Naylor v. Joseph* that the occasional absence of a foreigner domiciled in this country would be judged by the same standard as that of a subject.

Occasional absence of foreigner domiciled here.

It may be suggested that this rule should receive the same interpretation as the words ‘domiciled or usually resident’ in Order XI rule 1. (c.)

*Le Normand v. Pce: of Capua.* 6 Jur: 64.

The only case in which the principle was not acted on is *Le Normand v. Prince of Capua*. The plaintiff, who was a foreigner, had shops both in London and Paris, and resided in either country according to the necessities of her business ; the defendant admitted part of the debt. No security was ordered to be found, but the amount admitted was ordered to be paid, and some of it appropriated as security for the trial of so much of the dispute as remained to be decided.

*Ball v. Adrian.* 1 Taunt: 64.

In *Ball v. Adrian* security was ordered from a plaintiff who



was resident abroad, the action having been brought without his knowledge. Chapter V.

Will not be  
ordered  
where  
absence  
involuntary.

The third principle is that security will not be ordered when the absence is involuntary; the question of permanent residence remaining as before.

Examples.

Examples of the application having been refused are to be found in *Evering v. Chiffenden*, where the plaintiff was a lieutenant in the Navy and held the appointment of Harbourmaster in the Barbadoes: *Whittal v. Campbell*, an East Indian officer on service in India: *Garwood v. Bradbourne*, a private in the East India Company's service, although it was proved that soldiers were enlisted for life, and that there was no chance of his return to England unless he was discharged: *Lord Nugent v. Harcourt*, a Commissioner of the Ionian Islands, resident there: *Tullock v. Crowley*, a British subject, who was a prisoner in France: [and conversely, in accordance with the foregoing principles, it was refused in the case of a prisoner of war in this country (*Maria v. Hall*)].

*Evering v. Chiffenden*,  
7 Dowl: 536.  
*Whittal v. Campbell*,  
29 L. J.  
Ex: 326.  
*Garwood v. Bradbourne*,  
9 Dowl: 1031.

*Nugent v. Harcourt*,  
2 Dowl: 578.  
*Tullock v. Crowley*,  
1 Taunt: 18.

*Maria v. Hall*,  
2 B. & P.  
236.  
*Chappell v. Watts*,  
29 L. J.  
Q. B. 167.

The case of *Chappell v. Watts* may be distinguished. The plaintiff was an officer in a regiment quartered in Ireland; but he was an Irishman domiciled and ordinarily resident in Ireland; he was ordered to find security.

In a few cases only however the contrary seems to have been held; *Harvey v. Jacobs*, followed in *Barrett v. Power*, in which a plaintiff who was under sentence of transportation was ordered to give security; and *Seilaz v. Hanson* where the plaintiff had been removed by order of the Secretary of State under the Alien Act: and in *Plowden v. Campbell*, Lord Campbell, C.J., refused to extend this principle to a Judge in the East Indian Company's service.

*Harvey v. Jacobs*,  
1 B. & Ald:  
159.  
*Barrett v. Power*,  
9 Ex: 338.  
*Seilaz v. Hanson*,  
5 Ves: 261.  
*Plowden v. Campbell*,  
23 L. J.  
Q. B. 384.

To be given  
even if there  
will be  
application  
for judgment  
under O. xiv.

The nature of the plaintiff's claim will not affect the question of the defendant's right to security. In *le Banque des Travaux Publiques v. Wallis*, the plaintiffs said that they were going to proceed under Order XIV; on the strength of the affidavits the Master postponed making the order, but Field, J., in Chambers ordered immediate security to be given; [but see case on page 196].

*Banque des Travaux v. Wallis*,  
W. N. 1884-  
p. 64.

Foreign  
sovereign.

Foreign potentates will be liable to give security when plaintiffs in actions arising out of commercial transactions (*Emperor of Brazil v. Robinson*. *Otho King of Greece v. Wright*. *The Republic*

*Emp: Brazil v. Robinson*,  
5 Dowl: 522.  
*King of Greece v. Wright*,  
6 Dowl: 12.

Chapter V. of *Costa Rica v. Erlanger*), and in a cause of possession in the Admiralty Court (*the Mary or Alexandra*): although it was not required, in *the Duke of Montellano v. Christin*, from a foreign ambassador, it not being considered 'respectful to the crowned 'head whose servant he was,' unless there were some very pregnant reasons for making the order. In *Adderley v. Smith, Anon.*; and *Goodwin v. Archer* however it was required from people in the employ of ambassadors, the reason given in the last case being their privilege from arrest.

*Costa Rica v. Erlanger*.  
3 Ch: D. 62.  
*the Mary*.  
L. R. 1  
A. & E. 335.  
*Montellano v. Christin*.  
5 M. & S. 503.  
*Adderley v. Smith*.  
1 Dicken: 355.  
*Anon*:  
Mose: 175.  
*Goodwin v. Archer*.  
2 P. Wms: 451.  
*Aldborough v. Burton*.  
2 My: & K. 401.  
*Ferrars v. Robins*.  
2 Dowl: 636.  
*Chamberlain v. Chamberlain*.  
1 Dowl: 636.  
*Chevalier v. Finnis*. 1  
E. & B. 277.  
*Youde v. Youde*. 3 A. & E: 311.  
*Banque des Travaux v. Wallis*.  
W. N. 1884.  
p. 64.  
*Athens Ry: v. Hudswell*  
W. N. 1870,  
p. 131.  
*re Percy Co:*  
2 Ch: D. 531.  
*Cochrane v. Fearon*.  
18 Jur: 568.

A peer resident abroad will not be exempt, *Lord Aldborough v. Peers. Burton*; but the contrary was held in *Earl Ferrars v. Robins*. Executors must give security for such costs as they would be liable to in point of law (*Chamberlain v. Chamberlain. Chevalier v. Finnis*); and so also a plaintiff who may be suing for another's benefit (*Youde v. Youde*).

A foreign company will be compelled to give security: (*Banque Company. des Travaux Publiques v. Wallis*; and see the cases quoted on page 192, under the head of exemption on the ground of property within the jurisdiction): but an English company formed for the purpose of constructing a railway in a foreign country was held not to be a foreign company. (*Athens and Piræus Ry: v. Hudswell.*)

It will never be ordered from a defendant or respondent.

Never ordered from defendant.

In *re Percy Mining Co:* a shareholder residing out of the jurisdiction appeared to oppose a petition for winding up the company. Jessel, M.R., refused to order him to find security, approving the principle laid down in *Cochrane v. Fearon*.

In actions *in rem* the procedure is somewhat different with regard to the defendant; where there is a counterclaim the defendant will be ordered to find security for the entire costs (*the Julia Fisher*); but security for damages will never be ordered (*the D. H. Peri; the Mary or Alexandra*).

Action *in rem*.

The question whether a defendant, who has set up a counterclaim after admitting the cause of action, is entitled to security from the plaintiff resident out of the jurisdiction, was discussed in *Winterfield v. Bradnum*. The Court of Appeal held that if the counterclaim was in respect of an entirely distinct claim no security could be ordered, because it would be in the nature of a cross action to which the present plaintiff was defendant. Bramwell, L.J., thought however that if the counterclaim were for damages in respect of the same cause of action for a greater amount, or one equal to the plaintiff's claim, he would be entitled

Where defendant has counter-claimed.

*the Julia Fisher*.  
2 P. D. 115.  
*the D. H. Peri*.  
Lush: 543.  
*the Mary*.  
L. R. 1  
A. & E. 335.  
*Winterfield v. Bradnum*.  
3 Q. B. D. 324.

to security from the plaintiff. In *Mapleson v. Masini* the counter-claim was in respect of the same cause of action, the damages claimed being less than the plaintiff's claim. The Queen's Bench Division refused to order the defendant who was out of the jurisdiction to give security. Chapter V.  
—  
*Mapleson v. Masini*.  
5 Q. B. D  
144.

Interpleader  
issues.

In interpleader issues the principles adopted are somewhat different, and depend on the peculiar nature of the action.

In *Benazeck v. Bessett*, a claimant who was substituted for the defendant under an interpleader rule was held entitled to call upon a foreign plaintiff for security. *Benazeck v. Bessett*.  
1 C. B. 313.

In *Williams v. Crosling*, the judgment creditor who resided abroad was made defendant, and the assignees in bankruptcy plaintiffs: on an interpleader by the sheriff, the defendant was ordered to give security, the Court considering that the real nature of the action was a suit at the instigation of the execution creditor to have effect given to his execution. *Williams v. Crosling*.  
3 C. B. 957.

In *Belmonte v. Aynard* what is conceived to be the true principle was laid down: that the parties are made plaintiff and defendant for convenience, and that therefore the plaintiff, although out of the jurisdiction, cannot be called on to give security, as he does not occupy the position of a person commencing an action. *Belmonte v. Aynard*.  
4 C. P. D.  
221-352.

Exemption  
on the  
ground of  
property of  
permanent  
nature.

The only ground on which such persons as are liable to give security will be excused, is the possession of real property, or property of a permanent nature within the jurisdiction, which property may be rendered liable for payment of costs should judgment be given for the defendant in the action. The possession of money, or such property as can easily change ownership

Not money.

will not be sufficient (*Edinbro' and Leith Railway Co: v. Dawson*);

*Edinbro' Ry: v. Dawson*.  
7 Dowd: 573.

Case of a  
Company.

even though there be a large sum at the plaintiff's bank; and in the case of a company, even though many shareholders, responsible for the unpaid calls on their shares, are resident in the kingdom (*Limerick and Waterford Railway Co: v. Fraser*; *Kilkenny Railway Co: v. Fielden*). And even where the plaintiff does possess real estate in this country, it must clearly appear to

*Limerick Ry: v. Fraser*.  
4 Bing: 394.  
*Kilkenny Ry: v. Fielden*.  
6 Ex: 81.  
*Swinburne v. Carter*.  
23 L. J.  
Q. B. 16.  
*Hamburger v. Poetting*.  
30 W. R.  
769.

Realty must  
be un-  
encumbered.

the court that it is unencumbered, and that the defendant can recover his costs out of it by process of law (*Swinburne v. Carter*).

In *Hamburger v. Poetting* however this strict principle was not approved: Bacon, V.-C., declared the rule to be that the application for security would be refused if the plaintiff possessed substantial property in this country *whether real or personal*.

Chapter V.

*Orr v. Bowles.*  
1 Hodges 23.  
*Anon.*  
1 Dow 1300.  
*Anon.* 3  
*Taunt.* 207.  
*Thomel v. Roelants.*  
2 C. B. 290.  
*McConnell v. Johnston.*  
1 East 431.  
*Sykes v. Sykes.*  
L. R. 4  
C. P. 645.  
*Carr v. Shaw.*  
6 T. R. 496.  
*D'Hormusgee v. Grey.*  
10 Q. B. D. 13.  
*Umfreville v. Johnston.*  
L. R. 10  
Ch: 580.

There is no ground for supposing that any difference is made in this respect between subjects and foreigners: the principle of the whole subject being the presumption that foreigners are not likely to possess substantial property in the kingdom. In the case of joint plaintiffs, where only one of them is abroad, security will not be ordered (*Orr v. Bowles. Anon. Anon. Thomel v. Roelants*): even though the plaintiff who is within the jurisdiction is insolvent (*McConnell v. Johnston. Sykes v. Sykes*): but one of two defendants may make the application (*Carr v. Shaw*).

Rules applicable to subjects and aliens.

Joint plaintiffs.

The question whether the provisions of Order XVI. rule 1 of the Judicature Act, relative to the joinder of parties, had made any difference in the old law was discussed in the recent case of *D'Hormusgee v. Grey*. The decision of the Divisional Court was based on the Chancery case of *Umfreville v. Johnson*. There is however an important difference between the cases which it will be useful to notice. In the Chancery case two plaintiffs, each having a separate cause of action, joined in a suit to restrain a common nuisance. In the Common Law case two firms sued jointly, or in the alternative the English firm separately, or again in the alternative the Indian firm separately. Thus the two decisions embrace the many variations of joinder of plaintiffs which may occur. Rule 1 however covers all the cases and concludes thus:— 'But the defendant, though unsuccessful, shall be entitled to his 'costs occasioned by so joining any person or persons who shall 'not be found entitled to relief.' Let us see how the matter stands. In order to save the expense of two or more separate actions, the several plaintiffs may join and bring one action: there is some additional expense however occasioned by the joinder. In case of failure of both plaintiffs, each (supposing only two joined) is liable for the whole of the defendant's costs; as between themselves each is liable for half: if both are successful the defendant is relieved from the costs of two actions: if one is successful, the defendant has to pay the costs of the whole cause, less the costs of joinder; these costs fall on the unsuccessful plaintiff, and are the only taxed costs for which he is liable; but he has to pay them to the successful plaintiff, as they will have been deducted from the costs of the cause. But if the defendant is successful, both plaintiffs being liable for the whole costs of the cause, which include the costs of joinder, he has still some one within the jurisdiction to whom he can look for costs. Security from the plaintiff abroad is therefore unnecessary.

Joinder of parties under Order XVI. rule 1.

As between the plaintiffs themselves however it is by no means



improbable that the question might arise; more especially in cases where the plaintiffs have not been joined by consent. Chapter V.

Both plaintiffs out of jurisdiction. Following out the principle, where both plaintiffs reside out of the jurisdiction, security would be ordered from both proportionately, or from either.

Consolidated actions. The principle does not seem to apply to the consolidation of actions by different plaintiffs against the same defendant, and we should imagine that those plaintiffs who are out of the jurisdiction would still be liable to give security.

Amount. The amount of security is generally left in the discretion of the Master (*French v. Maule*); the question is dealt with generally by Order LXV. rules 6 and 7 [*cf. Paxton v. Bell*]. There seems some doubt whether it will be ordered to cover costs which have already been incurred. It was refused in the *Republic of Costa Rica v. Erlanger*, and *Sturlia v. Freccia*; but was given in *Massey v. Allen*: [*cf. Kemble v. Mills, supra* p. 187.]

Costs already incurred. An application for increased security may be made (*Republic of Costa Rica v. Erlanger*). In *Sturlia v. Freccia* Malins, V.-C., refused to make a further order because all the parties were foreigners who must, he said, fight it out among themselves. This was overruled by the Court of Appeal, the question not being affected in any way by the defendant's nationality.

When application to be made. The old rule seems to have been that the application might be made at any stage of the proceedings before issue joined (*Dowling v. Harman*); but in *Barker v. Hargreaves*, security was ordered after notice of trial. It will not however be ordered after an interlocutory judgment has been signed until it has been set aside (*Lusaletti v. Powell*); and it is too late to apply after final judgment has been given (*Bohns v. Sessions*).

After interlocutory judgment. The first application must be made as soon as there is any occasion for it; that is, directly the defendant knows of the plaintiff's absence; it will not be entertained if any further step has been taken after the absence has come to the defendant's knowledge. (*Melioruchy v. Melioruchy. Anon. ex parte Tull. Weeks v. Cole. Swanzy v. Swanzy*). But this rule must be qualified by the decisions in *Murrow v. Wilson* and *ex parte Seidler*, in which it was held that the defendant does not by simply defending an application against him lose his right to security. And on the same principle it was held in an Irish case, *Tellet v.*

*French v. Maule.*  
4 M. & G.  
*Paxton v. Bell.*  
W. N. 1876,  
pp. 221, 249.  
*Costa Rica v. Erlanger.*  
3 Ch. D. 62.  
*Sturlia v. Freccia.*  
W. N. 1878,  
p. 161.  
*Massey v. Allen.* 12  
Ch. D. 807.  
*Kemble v. Mills.* 1  
M. & G. 565.  
*Sturlia v. Freccia.*  
W. N. 1877,  
pp. 166, 188.

*Dowling v. Harman.*  
6 M. & W.  
131.  
*Barker v. Hargreaves.*  
6 T. R. 597.  
*Lusaletti v. Powell.*  
1 Marsh 376.  
*Bohns v. Sessions.*  
2 Dowl. 710.  
*Melioruchy v. Melioruchy.* 2  
Ves. Sen. 24.  
*Anon.*  
10 Ves. 287.  
*exp. Tull.*  
3 Dea. &  
Ch. 503.  
*Weeks v. Cole.*  
14 Ves. 518.  
*Swanzy v. Swanzy.*  
27 L. J.  
Ch. 419.  
*Murrow v. Wilson.*  
12 Beav. 497.  
*exp. Seidler.*  
12 Sim. 106.

What amounts to a waiver of right.



**Chapter V.** *Lalor*, that entering an appearance requiring a statement of claim to be delivered was not a waiver of the right to security: and again in *Dowling v. Harman* that it might be made after an order for time to plead. In *Duncan v. Stent* it was held that if the application is made after plea, the affidavit must expressly state the absence of knowledge before pleading [see case on page 196].

*Tellet v. Lalor*.  
8 L. L. R:  
C. P. D. 8.  
*Dowling v. Harman*.  
6 M. & W.  
131.  
*Duncan v. Stent*.  
5 B. & Ald:  
702.  
*Northampton Co. v. Midland Co.*  
38 L. T. 82.  
*Wyllie v. Ellice*.  
11 Beav: 99.

In the *Northampton Coal Co. v. Midland Waggon Co.*, there had been no application for security up to a late stage in the proceedings: but the statement of claim had been amended, and an entirely new case had been presented requiring additional evidence: the application was entertained. So in *Wyllie v. Ellice*, the defendant obtained security although he had filed his answer, as the plaintiff's residence abroad came positively to his knowledge for the first time by its being definitely stated in the plaintiff's amended bill.

Exception when new case presented.

*Grant v. Banque Egyptienne*.  
2 C. P. D.  
430.  
*Naersnoos Co. v. Royal Mail Co.*  
W. N. 1880, p. 133.  
*re Indian Mining Co.*  
22 Ch. D. 83.  
*Cole v. Beady*.  
5 Dowl: 161.  
*Jones v. Jones*.  
2 C. & J.  
207.  
*Luzalletti v. Powell*.  
1 Marsh 376.  
*Sandys v. Hohler*.  
6 Dowl: 274.  
*Joynes v. Collinson*.  
2 D. & L.  
449.  
*Cardwell v. Baines*.  
2 W. R. 525.  
*Adams v. Brown*.  
1 Dowl: 273.  
*Huntley v. Bulwer*.  
6 Dowl: 633.

The same principles apply to an appellant out of the jurisdiction. In *Grant v. Banque Franco-Egyptienne*, the appellant being a foreigner domiciled abroad was held to be a special circumstance within Order LVIII. rule 15, and security for the costs of an appeal from an interlocutory order was required. See also *Naersnoos Ice Co. v. Royal Mail Co.*. But in *re Indian Kingston Mining Co.*, the Court of Appeal held they would not be so strict in enforcing promptness as where the application is on the ground of poverty.

Appellant. [see cases cited on page 196.]

With regard to the affidavit it is doubtful whether the stage at which the proceedings have arrived should be shown: in *Cole v. Beady* and *Jones v. Jones* it was held to be unnecessary; and in *Luzalletti v. Powell* to be necessary, and this seems to be more in conformity with the principle of the cases just cited. In *Sandys v. Hohler* and *Joynes v. Collinson*, it was held that the plaintiff's residence abroad must be sworn to positively, and that information and belief with regard to it were insufficient: but in *Cardwell v. Baines* this was held to be sufficient, if the reasons on which the belief was founded were given, and if the facts thus stated remained unanswered. In *Adams v. Brown* and *Huntley v. Bulwer*, it was held that there must be a previous application to, and refusal by the opposite party to give the security: but in *Jones v. Jones* and *Baille v. De Bernales*, it was held unnecessary, although in the former case it was said that there would be no stay of proceedings until the security was given unless such an application had been made. In *the Constantine* however it was

Affidavits.

Application to opposite party necessary.

*Baille v. De Bernales*.  
1 B. & Ald:  
331.  
*the Constantine*.  
4 P. D. 156.

laid down that where the plaintiff was clearly liable, security ought to be asked for, offered and accepted without the intervention of the court.

Chapter  
V.

Plaintiffs  
in U.K.

With regard to security from plaintiffs residing in any part of the United Kingdom being no longer required, see the 'Judgments Extension Act, 1868,' considered in chapter xi.

Forms.

The forms connected with this subject will be found in Chitty's Forms, 11th ed: p. 216 *et seq.*

### ADDENDA :

to page 190, last line but three :—

but will not  
be given if  
claim be  
admitted.

but in a still more recent case, *De St. Martin v. Davis*, where the application under Order XIV. was about to be made on the strength of a direct admission by the defendants of their liability, Field, J., refused to order security, because it was impossible that the plaintiff could have to pay any costs.

*De St. Martin v. Davis.*  
W. N. 1884,  
p. 86.

to page 195, line 6 :—

will be given  
after time to  
plead and  
before plea.

if time to plead has been allowed, security will be granted at any time before the pleading has been delivered (*Wilson v. Minchin*).

*Wilson v. Minchin.*  
1 Dowl: 299.

to page 195, line 17 :—

appellant  
out of the  
jurisdiction

after 'appellant out of the jurisdiction,' add the following cases :—

*Hill v. Fox.*<sup>1</sup>

*Earl Dudley v. Lumley.*<sup>2</sup>

*Lewis v. Ovens.*<sup>3</sup>

*Bougleux v. Swayne.*<sup>4</sup>

<sup>1</sup> 27 L. J.  
Ex: 416.  
<sup>2</sup> 8 W. R.  
543.  
<sup>3</sup> 5 B. & A.  
265.  
<sup>4</sup> 3 E. & B.  
829.

in default of security being given, the respondent will be allowed to proceed to judgment.

## CHAPTER VI.

Chapter  
VI.

## THE RULE 'LEX FORI.'

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ALL matters relating to the procedure of an action are governed by the law of the country in which the action is brought. This is universally accepted and acted upon, and is called the rule '*lex fori*': the reason of it becomes sufficiently clear in the following enunciation of it.

'On matters of procedure, all mankind, whether aliens or liege subjects, plaintiffs or defendants, appellants or respondents, are bound by the law of the forum.' (Lord Campbell, C.J., *Lopez v. Burslem*.) 'A person suing in this country must take the law as he finds it; he cannot, by virtue of any regulation in his own country enjoy greater advantages than other suitors here, and he ought not therefore to be deprived of any superior advantages which the law of this country may confer. He is to have the same rights which all the subjects of this kingdom are entitled to.' (Lord Tenterden, C.J., *De la Vega v. Vianna*; *British Linen Co. v. Drummond*.) And cf: Story, Conflict of Laws, § 557, *et seq.*

The most important application of this rule in connexion with foreign judgments is the effect of Statutes of Limitation, which we now propose to consider.

*Lopez v. Burslem*.  
4 Mo:  
P. C. C. 300.

*De la Vega v. Vianna*.  
1 B. & Ad:  
284.  
*British Linen Co. v. Drummond*.  
10 B. & C.  
903.

General  
examination  
of rule  
*lex fori*.

## STATUTES OF LIMITATION.

Statutes of Limitation have three distinct bearings upon the subject of foreign judgments.

Statutes of limitation. Their bearing on the subject.

i. Where there exists concurrent jurisdiction, the remedy being barred in one country and not in the other.

ii. Where there exists concurrent jurisdiction, but where a judgment has already been given in one country, which judgment has proceeded upon the Statutes of Limitation of that country.

iii. The time after which the remedy upon a foreign judgment is barred.

i. *Where there exists concurrent jurisdiction, the remedy being barred in one country and not in the other.*

Concurrent jurisdiction. Remedy barred in one country only.

We have explained in a former chapter [*cf.* p. 64], what is meant by the term 'concurrent jurisdiction;' a cause of action in respect of the same matter exists in two countries. Now, Statutes of Limitation, so long as they do not actually extinguish the debt, are part of the rules of procedure of the courts, barring only the remedy or right to sue in the country. And every country having Statutes of Limitation peculiar to itself, the prescribing time naturally varies in each according to the will of the Legislature: and it follows therefore that where the cause of action is existent in two or more countries, following the abode of the parties the place of contracting, etc., the right to sue may be taken away by statute in one, while remaining in full vigour in another. The question then is, what effect will be given to a plea, in an action in this country, alleging that the cause of action is barred by the statutes of the other country; and if that other country happen to be the one where a contract was entered into or was to be performed, that this bar is in accordance with the *lex loci contractus*?

Universal rule that the plea is bad.

On this subject the language of Huber expounds what has long been the universal rule:—'Ratio hæc est, quod prescriptio et executio non pertinent ad valorem contractus, sed ad tempus et modum actionis instituendæ' [De Conflictu Legum]. Thus in *Cooper v. Earl Waldegrave*, Lord Langdale, M.R., said, 'If a remedy is sought for non-performance of a contract, the interpretation of which is to be governed by the law of the country where it was made, the mode of suing and the time within which the action must be brought are to be governed by the law of the country in which the action is brought:' and Sir John Jervis,

*Cooper v. Earl Waldegrave.*  
2 Beav: 282.

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*Ruckmaboye*  
v.  
*Lulloobhoy*.  
8 Mo:  
P. C. C. 4.

delivering the judgment of the Privy Council in *Ruckmaboye v. Lulloobhoy Mottichund* :—‘While the courts of almost all civilised countries entertain causes of action which have originated in a foreign country, and adjudicate upon them according to the law of the country in which they arose, yet such courts respectively proceed according to the prescription [*query*, limitation] of the country in which it exercises its jurisdiction.’

*Huber v.*  
*Steiner*.  
2 Sc: 304.

So in *Huber v. Steiner*, where the distinction was drawn between that part of the law relating *ad decisionem litis*, which is adopted from the foreign country; and that part relating *ad litis ordinationem*, which is taken from the *lex fori* of that country where the action is brought. Statutes of Limitation are essentially connected with the conduct of the suit, and part of the *lex fori*; varying it may be, in every forum, and with every subject matter :—‘It is only the remedy, and not the cause of action that is barred by the foreign statute; the foreign prescription is no more than a limitation of the time within which the action must be brought in the foreign court.’ (Tindal, C. J.)

*Alliance*  
*Bank of*  
*Simla v.*  
*Carey*.  
5 C. P. D.  
429.

And again in the *Alliance Bank of Simla v. Carey*, the Indian and English courts had concurrent jurisdiction, but the action was on a specialty debt, and in Indian law there is no distinction made in this respect between specialty and simple contract debts, the remedy in either case being extinguished in six years: it was held that the action could be brought in England within twenty years.

The same doctrine was approved in the following cases :—

<sup>1</sup> 5 Cl. & F.

*Don v. Lippman*.<sup>1</sup>

<sup>2</sup> 3 Cl. & F.

*Fergusson v. Fyffe*.<sup>2</sup>

<sup>3</sup> 121.

*Lopez v. Burslem*.<sup>3</sup>

<sup>4</sup> 4 Mo:  
P. C. C. 300.

*British Linen Co. v. Drummond*.<sup>4</sup>

<sup>5</sup> 10 B. & C.

*Bury v. Goldner*.<sup>5</sup>

<sup>6</sup> 903.

*Williams v. Jones*.<sup>6</sup>

<sup>8</sup> 34.

<sup>9</sup> 13 East

439.

And *cf.* Story, Conflict of Laws, § 577 *et seq.*

In British Columbia however the rule has been abolished, and a Statute has recently been passed (40 Vic: c. 109: *cf.* p. 393), which provides that if the remedy on a cause of action is barred in the country of its origin it shall be a good defence in the Colony. A similar provision exists in many of the Codes of the United States [*cf.* chapter xiv.].

But a distinction has been drawn by nearly all the old jurists between those statutes which bar the remedy, which we may call Statutes of Limitation proper, and those which do in fact extin-



Statutes of  
Prescription.

guish the debt or cause of action, and which have been called to distinguish them Statutes of Prescription. The opinion seems to be almost universally accepted that these are something more than mere Statutes of Procedure, 'because they not only extinguish the 'right of action, but the claim or title itself, *ipso facto*, and declare 'it a nullity after the lapse of the prescribed period.' [Story, Conflict of Laws, § 582 *et seq.*] and this principle has been adopted by the Indian Limitation Act (Act xv of 1877, s. 11. *cf.* p. 382) which provides that a defence relying on such a statute shall be good.

In an American case—*Hendricks v. Comstock* [Indiana]—this was doubted, and the court held that these statutes also related to procedure, and that a judgment proceeding upon one did not go to the merits of the case and was therefore not to be recognised or enforced. But in *Beckford v. Wade* the law of Jamaica of 4 G. II, giving an absolute title to lands from adverse possession, was held not to be one of procedure; and the general doctrine stated above was approved by Tindal, C.J., in *Huber v. Steiner*.

Section 4 of  
the Statute  
of Frauds.  
*Leroux v.*  
*Brown*  
considered.

It will be appropriate here to notice the important decision in the case of *Leroux v. Brown*; the Court of Exchequer Chamber held that the fourth section of the Statute of Frauds relates merely to procedure, and that therefore an action cannot be maintained in England on a parol agreement which is not to be performed within one year, although it was made in France and was valid and enforceable there.

Criticised by  
*Willes, J.*

This decision has provoked much controversy. In *Williams v. Wheeler*, Willes, J., thus commented on it:—'I cannot help 'observing that I should require much more argument to satisfy 'me that a contract made in France without writing, which is valid 'by French law, is incapable of being enforced in an English 'court by reason of the requirements of the English law as to the 'formalities of contracts made in England. The general rule is '*locus regit actum*. And, though I fully recognise the principle 'upon which the judgment of this court in *Leroux v. Brown* professes to be founded, namely, that the procedure is regulated by 'the *lex fori*, I am not satisfied that either of the sections of the 'Statute of Frauds to which reference has been made warrants the 'decision.' And in a later case, *Gibson v. Holland*, the same learned judge again spoke of the decision in these terms:— 'Great difficulty has arisen as to the construction of this section 'as being applied to evidence only; and I have on a former occasion expressed the inability I felt to understand the case of

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*Hendricks*  
*v. Comstock*  
12 Ind;  
Rep: 238.

*Beckford v.*  
*Wade*.  
17 Ves: 87.

*Huber v.*  
*Steiner*.  
2 Sc: 304.  
*Leroux v.*  
*Brown*.  
12 C. B. 801.

*Williams v.*  
*Wheeler*.  
8 C. B:  
N. S. 299.

*Gibson v.*  
*Holland*.  
L. R. 1 C.  
P. 1.

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'*Leroux v. Brown*, though of course we are bound by it.' On the other hand there are the judgments of Jervis, C.J., and Maule, J., which cannot be lightly ignored.

Stated shortly, the point in dispute seems to be this :—The fourth section says, an action shall not be brought on certain agreements unless certain evidence is produced to remove the fraud pre-attached to such agreements by the statute :—

Does this section refer merely to procedure?

The question then is reduced to this :—Is the requirement of certain evidence part of the law of procedure?—The answer must be in the affirmative.

*Leroux v. Brown*.  
12 C. B. 801.  
*Nekram v. Iswariprasad*.  
5 Bengal Rep: 643.

But *Leroux v. Brown* has also been attacked from another point of view in the Indian courts. In the case of *Nekram Jemadar v. Iswariprasad Pachuri*, Couch, C.J., said that he agreed with Story in not distinguishing as is usually done the fourth from the seventeenth sections: Phear, J., said that in his opinion section 4 was undoubtedly a rule of procedure, but that in cases where such a conflict arose as in *Leroux v. Brown*, the rule of procedure ought to be abandoned in favour of the law of contract :—The requirement of section 4 is paralleled with 'such a rule as that which would disqualify parties to a suit from being witnesses in their own behalf. The effect of this rule in cases of any parol contract to which the party alone could speak, would be precisely analogous to that of section 4, for obviously the aggrieved party would be deprived by it of the only means which he possessed of proving his contract; and I suppose no one would consider a rule which disqualified a certain class of persons from appearing as witnesses to be anything other than a rule of procedure. It may be questioned whether the principles which admittedly guide the courts of all countries in the administration of justice under a conflict of law, do not in truth necessitate the abandonment of the rule of procedure in favour of the law of contract: The Court of Common Pleas no doubt went the length of holding that the rule of procedure must still be maintained. I think I should hesitate a long time before I should be able to bring myself to concur in that conclusion. But the first part of s. 17 of 21 G. III. c. 70, makes the manner of hearing and determining, which comprises the procedure of the Supreme Court, (and therefore impliedly in my opinion section 4)—generally applicable to the suits to which it refers: but the latter part expressly cuts this down by the proviso that in the case of Gentus, all matters of contract and dealing between party and party shall be determined by the laws and usages of Gentus; in

Criticised by Indian Judges.

Should not the rule of procedure be waived?

Section 4, though relating to procedure, does not apply to Gentus: on account of 21 G. III. c. 70, s. 17.

'other words, the rule of procedure if it affects the original right of the parties, must in the event of conflict give way to the law and usages of Gentus.'

In this Indian case a statute solved the difficulty: but the necessity for such a statute seems to imply that in its absence the rule of procedure would be the more powerful in determining upon the conflict: an injustice to the natives which the legislature sought to remove. But the arguments of Phear, J., seem to apply with equal force to Statutes of Limitations; and once the fourth section is conceded to be a question of evidence, that is a question of procedure, we can suppose a Statute of Limitation to stand in its place in *Leroux v. Brown* without affecting the principle of that decision. Till however the case is overruled it must be considered to be good law. *Leroux v. Brown*,  
12 C. B. 801.

[cf. Story—'Conflict of Laws'—§§ 262, 435, 631.]

ii. *Where there exists concurrent jurisdiction, but where a judgment has already been given in one country which judgment has proceeded upon the Statutes of Limitation of that country.*

Foreign  
judgment  
proceeding  
on statute.

The real  
effect of this  
judgment.

Shortly the question is this, what effect will be given to a foreign judgment based on a Statute of Limitation? The preliminary discussion having paved the way, the answer may very easily be arrived at. The judgment will be disregarded: for substantially all that it declares is, that by the lapse of so many years, the plaintiff has lost his right to sue in the courts of that country, (Lush, J., *Harris v. Quine*), and not that he has lost his right to sue in the courts of any other country, in which he is entitled to bring an action for the same cause. In the same case Blackburn, J., forcibly expressed his views upon the subject:—'The plea shews that the Manx court has decided that the debt is barred in three years; but I don't really see why by the Comity of Nations we ought to hold the debt barred here: where it appears that the very point in dispute has been the subject of an express decision in a foreign court, we are estopped from dealing with it; but it would be very strange if the decision of the Manx court that three years has elapsed since the cause of action, should be an answer to it in England.'

There are two ways of considering the question:—

In *Harris v. Quine*, Cockburn, C.J., based his decision upon the ground of the dissimilarity of the issues: a ground, it will be remembered, fatal to the plea of judgment recovered:—the issue in the Manx court was whether three years had elapsed: in the

*Harris v. Quine*,  
L. R. 4  
Q. B. 653.

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VI.

English court, whether six years.—There may of course be a coincidence in the number of years necessary, by the English and foreign statutes, to suspend the cause of action.

The practice of the courts coincides also in every respect with the principles advanced in the earlier chapters. The courts have declared that the fact of the judgment having proceeded on a foreign Statute of Limitation does excuse the plaintiff's obedience to the negative obligation. In so doing, have they acted as Appeal Courts from the foreign court? Clearly not:—For there has been no judgment upon the merits abroad, which it would be the province of a Court of Appeal to review: Neither do they criticise the foreign statute: they have only acted upon a doctrine of International Law, that each country is entitled to regulate the procedure of its own courts; and have declared the English Statutes limiting the time in which an action may be brought in English courts, to be different from the foreign Statutes. But remembering the distinction already drawn, a different principle would apply where the judgment has proceeded on a foreign Statute of Prescription. Then, not only the remedy in the foreign court having been barred, but the title in the opposite party confirmed; the recovery of a debt not only having been denied to the suitor, but a presumption of payment raised, such a judgment is virtually on the merits of the case and should be recognised and enforced in this country. But *cf. Hendricks v. Comstock* [Indiana] quoted on page 200.

Practice of the courts agrees with principles in this chapter.

Statutes of Prescription.

*Hendricks v. Comstock.*  
12 Ind.  
Rep: 238.

iii. *The time after which the remedy upon a foreign judgment is barred.*

The question of time, that is the consideration whether in an action on a foreign judgment the English Statutes of Limitation may be pleaded, involves two questions of some difficulty:—

Consideration whether English statute may be pleaded to foreign judgment.

From what period is the time to be calculated?

What length of time bars the action?

Adopting the words of the statute, the 'cause of such action' appears to be the foreign judgment, and this being so, the time would run from the date of such judgment: but it may also be said, that the 'cause of such action' is the plaintiff's coming into this country; or even the exercise of his discretion in calling into action the latent auxiliary sanction resident in the English Sovereign Authority: in the former case, some difficulty would arise in fixing the precise period of his arrival here: in the latter case, the question under the Statute, of course, could not be raised.

What period time to run from?

In *Heera Monee Dossia v. Promothonath Ghose* [India], the decision of the Lower Appellate Court, that the cause of action did not accrue within the cognisance of the English court until the proceedings in execution which had been taken in the French court proved totally or partially infructuous, was overruled; after accepting the doctrine of *Williams v. Jones*, Phear, J., continued, 'But if the obligation to pay which is imposed by the judgment be final and definite, the fact of the non-payment must render the cause of action complete, quite irrespective of any proceedings in execution to obtain payment. In truth the judgment creditor is not bound to take any such proceedings at all unless he chooses, his right against the judgment debtor to be paid stands entirely clear of them. Therefore his title to come into another court to enforce that by suit must be clear of them also, and must date from the day upon which judgment was finally given.'

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*Heera  
Monee v.  
Ghose.*  
8 W. R. Civ:  
Rul: 32.  
*Williams  
v. Jones.*  
14 L. J:  
Ex: 145.

What is to  
be the  
limiting  
period?

But supposing the time to run from the date of the foreign judgment, is the limiting period to be twenty years as on an English judgment, or six years, the judgment being treated as a simple contract debt?

In *King v. Demers* [Lower Canada], it was stated in the argument that the English period was six years, and that therefore the Canadian period should be the same. Mackay, J., said that in Canada there was but one law of limitations for home and for foreign judgments; and that he doubted whether the English period were really six years, the contrary being laid down in books, especially in Wilkinson on Limitations.

*King v.  
Demers.*  
15 L. C.  
Jurist 129.

In India and in many of the American States the limiting period on the home and foreign judgments is different.

In some of the oldest cases, for example *Dupleix v. De Roven* and *Atkinson v. Lord Braybrooke*, it has been held that a foreign judgment, when it comes before the English courts, is nothing but a simple contract debt: but in the second part of

*Dupleix v.  
De Roven.*  
2 Vern: 540.  
*Atkinson v.  
Braybrooke.*  
4 Camp:  
308.

[cf: p. 22.]

the first chapter, we have endeavoured to show that this idea is fallacious and completely at variance with either of the general theories, and it is suggested that if the English statute can be pleaded, the limit must be twenty years as on an English judgment (*Watson v. Birch*). The rule would then be that the English courts cannot be made use of for the recovery of judgment debts, whether English or foreign, after twenty years. If however the theoretical foundation of the whole question be the *commission rogatoire*, or demand by the foreign tribunal itself, [cf: p. 12], courtesy would

*Watson v.  
Birch.*  
15 Sim: 523.

Should not  
the rule be  
waived?



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VI.

*Reimers v. Druce*,  
26 L. J.  
Ch: 196.

seem to demand the waiving of the rule of procedure. This may possibly have been the view taken by Romilly, M.R., when he held in *Reimers v. Druce*, that Statutes of Limitation could not be pleaded in an action on a foreign judgment, but that nevertheless the plaintiff ought to be diligent in his proceedings, and that a delay of thirteen years was unreasonable.

From the foregoing discussions it is evident that a defence setting up a foreign Statute of Limitation as having extinguished the time within which the foreign judgment might have been sued upon in the country, in which it was pronounced, is bad.

It is also clear that this question of time does not apply in any way to the defendant's plea of judgment recovered.

## INTEREST ON A FOREIGN JUDGMENT.

The rate of interest on a judgment may also be considered part of the procedure of the courts, and will therefore come within the rule *lex fori*. Therefore the question of interest on a foreign judgment will be governed by the law of the country *whence the judgment comes*. If interest is given by that law on the judgment, whatever the rate may be, it becomes an integral part of the judgment to enforce which the action is brought in the English courts; if no interest is given by the foreign law, none can be recovered here: the question depends entirely on the foreign law, which unless it is specified in the judgment, will have to be proved in the usual manner.

Interest on foreign judgment to be regulated by rules of foreign country.

*Arnott v. Redfern*,  
3 Bing: 353.  
*Douglas v. Forrest*,  
4 Bing: 686.  
*King v. Demers*,  
15 L. C.  
Jurist 129.

This is in accordance with *Arnott v. Redfern*, *Douglas v. Forrest*, and *King v. Demers* [Lower Canada].

So too, if by the foreign judgment, interest has been given on the contract which was the foundation of the action, that interest will be recoverable. In *Arnott v. Redfern* it was contended that, as the contract which was the foundation of the action in which the foreign judgment had been given, was made in England, and was a contract upon which no interest would be allowed by our law, the court was not bound by that part of it which awarded interest: but Best, C.J., held that this argument could not be maintained in conformity with the rule that an error in English law forms no defence to the action, or to any part of it.

Interest awarded by foreign court can be recovered.

*Loney v. Richards*,  
Argus Rep:  
28 March,  
1861.

See also *Loney v. Richards* [Victoria].

What rate  
after English  
judgment  
pronounced?

The only difficulty appears to be whether, when the English court by its judgment gives effect to the foreign judgment, the after-accruing interest is to be calculated by English or foreign law. We must revert to the general theory :—The creditor is no longer to be considered as *electing to treat the foreign judgment as a debt in England*; were he able to do so, undoubtedly the English rate would run on the English judgment :—but the creditor in reality takes advantage of a comity by which one state exercises its power of enforcing an obligation for the advantage of another state; the judgment of the court is the act of clothing with power the judgment of the foreign court, inoperative beyond its own jurisdiction;—it seems therefore to be a natural consequence that the rate of interest, according to the foreign law, should continue to accrue.

No merger  
of foreign  
judgment  
in English  
judgment.

For, there is no merger of the foreign judgment in the English judgment as of any ordinary cause of action, it still continues to exist until it is satisfied, notwithstanding the English judgment upon it (*Fakuruddeen Assan v. Official Trustee of Bengal*.—Calcutta): and if the English court will enforce the foreign rate up to the date of giving that judgment, it seems to follow that it should continue to do so until payment. The interest on the judgment is separable from the original debt, and supposing the judgment satisfied only so far as regards that debt, and not so far as the interest accrued on the judgment, there is no doubt than an action could be maintained in this country on the foreign judgment to recover the interest alone. Thus it follows that till satisfaction of the English auxiliary judgment the foreign rate of interest must still be accruing, and that an action could be brought for that amount. It follows too that if by the English judgment the English rate of interest were only accorded till payment, an action could be brought in the foreign country to recover the difference between the English and the foreign rates; and this judgment in its turn might form the subject of an action in England.

*Fakurud-*  
*deen v.*  
*Official*  
*Trustee.*  
I. L. R:  
7 Cal: 82.

Foreign rate  
should  
accrue.

#### COSTS AWARDED BY THE FOREIGN COURT.

Costs  
awarded by  
foreign  
court can be  
recovered

In like manner all questions as to costs are questions of procedure, and will be governed by the foreign law.

If the foreign court by its judgment has awarded costs to the successful party, they also become an integral part of that judg-

**Chapter VI.** ment to enforce which the action is brought in the English courts, and as such can be recovered.

*Russell v. Smyth.*  
9 M. & W.  
810.

This is in accordance with *Russell v. Smyth*, a case in which the action was brought for costs alone, they having been awarded against the defendant in a suit for divorce abroad.

And it would seem also that if by the foreign law costs follow the event, upon proof of that law they can be recovered although they are not expressly awarded by the judgment.

#### PARTIES TO THE ACTION ON THE FOREIGN JUDGMENT.

So too as to the parties to the action on the foreign judgment : the rules of procedure of the court in which the action is brought must be complied with ; foreign suitors must take these rules as they find them, and must sue and submit to be sued in accordance with them.

*Abouloff v. Oppenheimer.*  
52 L. J.  
Q. B. 309.

For example, a married woman having recovered judgment in a foreign country, by the laws of which she is allowed to sue by herself, will not be allowed to bring an action on that judgment in this country except by her husband or next friend, without the leave of the court (*Abouloff v. Oppenheimer*). This is of course subject to the usual exceptions, for which see Chitty's Forms of Proceedings, 11th ed: pp. 519-520.

*Vanquelin v. Bouard.*  
33 L. J.  
C. P. 73.

But on the other hand, the character in which the sues will be governed by the foreign law. Thus in *Vanquelin v. Bouard* a widow, who by the law of France was donee of the universality of her husband's real and personal estate, and who thereby became entitled personally to sue and be sued in respect of debts owing to and from the estate, was held entitled to sue on a French judgment in this country without taking out letters of administration.

*Kandasami v. Moidui.*  
1 L. R.  
2 Mad: 338.

The converse of this rule was decided in *Kandasami Pillai v. Moidui Saib* [Madras]. The nature of the execution on the judgment enforcing a foreign judgment is of course part of the *lex fori*: and therefore an action on a French judgment against the defendant's father, who was deceased, having been brought against the son, the decree was granted only against him as representative to be levied from the assets of the deceased.

The same remarks apply as to actions by infants, persons of unsound mind, and bankrupts.

But as before, the determination of the status may also depend on foreign law: the law on this subject is discussed in chapter x.

Parties to action on foreign judgment.

Married woman.

Must sue according to English rules.

But the character in which she sues is governed by foreign law.

Infants, etc.:

In *Worms v. De Valdor*, a French subject had been adjudicated prodigal, and by French law he would be unable to sue without his *conseil judiciaire*. Fry, J., held that there was no change of status, but that the requirement was merely a question of procedure in the French courts, and that therefore he might sue by himself in this country.

*Worms v. De Valdor*,  
49 L. J.  
Ch: 261.

In *Bullock v. Caird*, an action against a Scotch firm, a plea alleging that by Scotch law the firm or the whole individual members thereof jointly should have been sued before the parties individually was overruled, it being held to relate purely to procedure, and although it would have been a bar to the suit in Scotland, it was not so here.

*Bullock v. Caird*,  
L. R. 10  
Q. B. 276.

Security for costs is also part of the *lex fori*, as to which see chapter v.

Commission  
to examine  
witness or  
party.

So too is the issue of a commission for the examination of witnesses out of the jurisdiction :

No difference is made as to the examination of a party to the suit unless there are special reasons for making the party face the court or jury (*Armour v. Walker*).

*Armour v. Walker*,  
32 W. R.  
214.

As to the issue of a commission in an action on a foreign judgment see *ante* p. 120.

For another instance of the application of the rule see, Probate p. 318, as to the appointment of administrators; and the case of *ex parte Melbourn, re Melbourn*.

*exp. Melbourn*,  
L. R. 6  
Ch: 64.

Judgments  
by default.

In *the Delta, the Erminia Foscolo*, Sir Robert Phillimore seems to have held that a judgment by default is a judgment on a matter of form only and not on the merits; that the rules as to judgments by default are part of the *lex fori*, and consequently that a foreign judgment by default should not be recognised. This principle is also to be found in many foreign decisions. The facts of the above case however seem abundantly to show that there had been judgment on the merits. The principle should certainly be strictly limited to judgments coming from countries in which a judgment by default is a matter of form only, the law there not requiring an examination into the merits. See however the Italian case, *Demarre v. Bosso*, cited on page 480.

*the Delta*,  
1 P. D. 393.

*Demarre v. Bosso*,  
J. D. I. P.  
1879, p. 292.

## CHAPTER VII.

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## JUDGMENTS NOT RECOGNISED.

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## JUDGMENTS PROCEEDING ON PENAL LAWS.

It is an universal rule that the penal laws of a country are of no effect beyond the limits of the country; consequently judgments proceeding on such laws will not be recognised in any other state. Penal laws.  
Judgments  
proceeding  
on them  
disregarded.

Thus in *Folliott v. Ogden* it was admitted 'that by the criminal sentence of attainder of one sovereign independent state, no personal disability to sue in another was created' although it had that effect in the state where the sentence was pronounced; the principle was adopted by the Court of Probate in *Lynch v. Provisional Government of Paraguay* [post p. 317]; and it was also recognised in *Addams v. Worden* [Lower Canada], where it was held that the sentence of a court of criminal jurisdiction in a foreign state by which the exercise of the civil rights of men may be suspended or abridged, is limited in its operation to the state itself in which the sentence has been rendered, and does not deprive an individual of his natural rights elsewhere beyond that state. (See also *Wattier v. le Ministre Publique* [France]).

The doctrine was carried further in *Folliott v. Ogden*, and it was declared that the consequence of the attainder, the divestment of his property from the attainted person, would also be disregarded; 'for,' said Lord Loughborough, C.J., 'if the penal laws of a foreign country do not in themselves import a personal disability to sue in this, neither do they, by divesting the property

And also  
the conse-  
quences  
of them.



‘of a person in that country, take away his right of action in England. I would say that a right to recover specific property, such as plate or jewels in this country, would not be taken away by the criminal laws of another. The penal laws of foreign countries are strictly local, and affect nothing more than they can reach, and can be seized by virtue of their authority. A fugitive who passes hither cannot be affected in this country by proceedings against him in that which he has left, beyond the limits of which such proceedings do not extend.’ The consequence of this would seem to be that payment to the Crown of a debt due to a person under sentence of attainder would not be held a discharge in another state; but this was doubted in *McCrae v. Robinson* [Victoria], in the digest of which case the following note occurs: ‘In deciding that attainder does not prevent the plaintiff from suing, the court did not decide that attainder and payment subsequently to the Crown in Scotland would not form a good defence.’

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*McCrae v. Robinson.*  
Argus Rep:  
17 May,  
1858.

In *Maule v. Murray* the court refused to take judicial notice of the fact that the defendant had been arrested in America for the same debt, because it would be ‘unjust to deprive the plaintiffs of perhaps the only security they had for the payment of their debts.’ And in *Wolff v. Oxholm* it was held to be no answer in an action to recover a debt from a Dane, that a suit in Denmark for the same cause had been suspended, and the debt paid to commissioners in virtue of an ordinance made by the government of Denmark pending hostilities with Great Britain, whereby all ships, goods, money, and money’s worth of, or belonging to English subjects, were declared to be sequestrated and detained.

*Maule v. Murray.*  
7 T. R. 470.

*Wolff v. Oxholm.*  
M. & S. 92.

#### JUDGMENTS PROCEEDING ON REVENUE LAWS.

Revenue  
laws.  
Judgments  
proceeding  
on them  
disregarded.

It is also an universal rule that the Revenue laws of a country will not be taken notice of by another country; consequently also judgments proceeding on such laws will not be recognised. (*James v. Catherwood*; *Planché v. Fletcher*).

*Westlake.*

Nor, according to Mr Westlake, can it be imagined that a foreign judgment sustaining a claim founded in a breach of the English Revenue Laws would be enforced here. [International Law 1st ed: § 388.] This may also be referred to the general principle of defence, that the enforcement of the judgment would involve a violation of English public law. Such cases may

*James v. Catherwood.*  
3 D. & R.  
190.  
*Planché v. Fletcher.*  
1 Doug:  
251.

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possibly occur, the doctrine on which the foreign courts would proceed being based upon what has 'long been laid down as a settled principle, that no nation is bound to protect or to regard 'the revenue laws of another country. (Lord Mansfield, C.J., *Holman v. Johnson*). A contract made in one country by 'subjects and residents there to evade the revenue laws of another 'country is not deemed illegal in the country of its origin.' [Story—Conflict of Laws, § 257.]

*Holman v. Johnson.*  
1 Cowper,  
341.

*Story*  
§ 257.

This principle has been argued against strongly by Pothier, Kent, and others; and defended by Valin and Emerigon. 'It 'is, however,' adds Story, 'firmly established in the actual practice 'of modern nations; too firmly, perhaps, to be shaken, except by 'some legislative act abolishing it.'

Two isolated cases may be noticed here.

*Robinson v. Bland.*  
1 W. Bl:  
234, 256.

In *Robinson v. Bland*, the judgment of a French Court of Marshalls, a 'Court of Honour,' with regard to the payment of a gaming debt, was disregarded as being the sentence of a 'whimsical 'and fantastical court,' resembling the Lawless Court held at Rochford in Essex.

Foreign  
fantastical  
courts.

*Gage v. Bulkley.*  
3 Atk: 214.

And in *Gage v. Bulkley*, the judgment of a French Commissary Court for the same cause being pleaded in bar, the court refused to recognise it, because it was the sentence, not of a judicial tribunal, but of a court of a purely political nature 'to determine 'disputes that might arise in relation to French actions.'

Foreign  
political  
courts.

*Price v. Dewhurst.*  
8 Sim: 279,  
302.

These decisions must not be confused with the doctrine laid down in *Price v. Dewhurst*, in which a decision of the Executor's Court of Dealing of St. Croix was called in question [*cf.* p. 117].

## JUDGMENTS OF INFERIOR COURTS.

It will not be inappropriate now to consider the effect of judgments of inferior tribunals, which are sometimes said to come under the head of unrecognised judgments. Mr Bigelow in his elaborate Treatise on the Law of Estoppel has devoted some space to the subject [pp: 258-264], but he treats almost exclusively of the inter-state effect of judgments of the American Justices of the Peace, a question depending on the statutes of, and consequently purely of interest in, the United States. It is not unfrequently

Judgments  
of inferior  
courts.

said that an action cannot be maintained on a judgment of an inferior court of a foreign country, that is to say, of those courts abroad resembling in their jurisdiction the English County Courts, which although inferior courts, are none the less Courts of Record.

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Actions on  
County  
Court  
judgments.

This notion proceeds on a misconception of what the law really is with regard to actions on County Court judgments. It was decided very soon after the creation of the courts that such an action would not lie, for the reason given by Lord Campbell, C.J., in *Berkeley v. Elderkin*. The Act constituting these courts intended to establish an easy and cheap recovery of small debts, and it provided special remedies for enforcing the judgments. Therefore the law, not looking with any favour on actions of judgments of the superior courts, will certainly not allow actions on judgments of inferior courts. The second reason given that the judgment is not final because the judge has power to review is evidently fallacious, and it seems to have been so thought in a later case, *Austin v. Mills*. The rule is there again laid down, but the judges were careful to explain that it in nowise altered the effect of such a judgment being a conclusive bar to an action in another court, for the same cause of action.

*Berkeley v.  
Elderkin.*  
1 E. & B.  
805.

*Austin v.  
Mills.*  
9 Ex: 283.

The rules as  
to County  
Courts not  
applicable  
to foreign  
inferior  
courts.

The argument based on the constitution of the English courts clearly does not apply to foreign courts whose jurisdiction is in like manner limited to the recovery of small debts, and there seems therefore no doubt that an action may be maintained equally on the judgment of an inferior as of a superior foreign court.

Consular  
Courts.  
Certificate  
of non-  
judicial  
officers.

In *Waldron v. Coombe*, the court refused to recognise the certificate of a British Vice-Consul, he being a non-judicial officer, although the proceedings in which it was given were somewhat analogous to those of courts of law.

*Waldron v.  
Coombe.*  
3 Taunt:  
162.

In *Forbes v. Scannell* [California], an assignment had been executed in Canton before the United States Consul, and a controversy arising before him, in which the validity of the assignment was involved, he held it to be valid: there was a right of appeal from his decision to the United States Commissioners. The court refused to hold it conclusive. 'But,' adds Mr Bigelow [Law of Estoppel, p. 264], 'the case is different when the statute has 'given such courts the necessary authority to try certain causes: 'and in such case a judgment for the plaintiff is final and conclusive 'when rendered; or for the plaintiff with satisfaction, will bar all

*Forbes v.  
Scannell.*  
13 Cal:  
Rep: 242.

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‘further litigation for the same cause of action in the domestic  
‘ courts, if the Consular court acted within its jurisdiction.’

*Smith v.  
Nicholls.*  
8 L. J.  
C. P. 92.  
*Barber v.  
Lamb.*  
29 L. J.  
C. P. 234.

There can be no doubt that this is the true principle, although some doubt seems to have been thrown upon it by the judgment of Tindal, C.J., in *Smith v. Nicholls*, with regard to the Vice-Admiralty Court of Sierra Leone. It was however recognised in *Barber v. Lamb*, the judgment in question being that of the Consular Court at Constantinople established by statute. Judgments of Consular Courts seem therefore properly included in the definition already given of foreign judgments. [cf: pp: 42. 43.] [cf: p. 2.]

Judgments of the Inferior Courts of the United Kingdom are dealt with by the ‘Inferior Courts Judgment Extension Act, 1882.’ [cf: p. 362]

*re Farina.*  
27 W. R.  
456.

The case of *re Farina* requires to be specially noticed. Registration of a trademark had been granted to one Buchholz by the Court of Appeal at Cologne, the opposition to the grant, on the ground of infringement, being overruled. Application was afterwards made by Buchholz for registration in England, which was again opposed by Farina. Hall, V.-C., refused to pay more respect to the German judgment than to the finding of a jury, the question being one of fact. Foreign judgment as to registration of trademark.

The question involved is by no means free from difficulties. One view that may be taken of it is the following: the questions before the two courts were in reality dissimilar: in Germany, whether the grant of registration would violate the German Patent Laws: in England, whether the grant would violate the English Patent Laws. It is evident that a negative answer to the former could not necessitate a negative answer to the latter. But unfortunately, the same question was involved in both decisions: was Buchholz’s trademark calculated to deceive? and it is not easy to understand why, when once that has been decided, that decision could not be pleaded as *res judicata* in the second suit. It is also evident that if the German suit had been brought for damages for infringement, and the judgment had been for the plaintiff, he could have recovered the amount awarded in the usual way here; if for the defendant, he could have pleaded it in bar to an action in England in respect of the same infringement. But here again the same difficulty presents itself, if the German action had been for infringement in Germany, and the English action for infringement in England, what would have been the effect of the German decision?

Foreign judgment for damages for infringement.

## CHAPTER VIII.

## SERVICE OUT OF THE JURISDICTION.

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THE discussion on the subject of assumed jurisdiction will have prepared the way for the enquiry as to the manner in which, the jurisdiction having been assumed, notice of the action will be conveyed to the absent defendant. Few words will now suffice to summarise what we ventured to put forward as the true view of this somewhat complicated question: A discretion is vested in every state to declare in what cases its courts may call on a defendant out of the jurisdiction to appear to an action commenced within it. And thus, having power to say in what cases it may be done, there is also power to provide the manner in which it shall be done. A recognition of the first principle involves a recognition of the second as a matter of course. Under the head of 'Natural Justice' we considered the corresponding right of reviewing both the cases and the manner in which the jurisdiction is assumed by the laws of any other state, more especially with reference to the process, which must of necessity be somewhat artificial. The principle of complete recognition, it will be remembered, was laid down in *Becquet v. McCarthy* and *Reynolds v. Fenton*, but the contrary doctrine in *Schibsky v. Westenholz*.

Summary  
of principles  
of assumed  
jurisdiction.

[cf. p. 172.]

*Becquet v. McCarthy*,  
2 B. & Ad.  
951.  
*Reynolds v. Fenton*,  
16 L. J.  
C. P. 15.  
*Schibsky v. Westenholz*,  
L. R. 6  
Q. B. 155.

Having therefore discussed the general principles on which such rules are based, we proceed now to an examination of the practice of the United Kingdom under the rules adopted in England, Ireland and Scotland.

## ENGLAND.

The first and most important consideration which arises under the English rules for service out of the jurisdiction, is that the orders and rules relate merely to the service of *writs*. In the Irish Judicature Act [*post* p. 235] section 33 deals with the service of 'any document by which a cause may be commenced': but the English rules deal only with a 'writ of summons'; and as the right

Order XI.  
relates to  
writs alone.

Cases in which it has been held that this must be construed strictly.

depends solely on statute, these words are to be construed strictly (Jessel, M.R., *re Maugham*): in that case leave to serve a common order to tax on an English solicitor out of the jurisdiction was refused. So in *re Mewburn's Settled Estates*, leave to serve a petition presented under the Leases and Sales of Settled Estates Act, 1856 (19 & 20 Vic. c. 120) on the respondent out of the jurisdiction was refused; the grant of leave in an earlier case—*Shurmur v. Hodge*—being disapproved. The rule was extended in *Potters v. Miller* [see p. 221] to the service of an endorsed counterclaim on a new party to the action. 'The right to serve a writ abroad depends entirely on statutes, or on rules made by virtue of some statute, and must be strictly interpreted' (Pollock, B.). Again in two Irish cases before the Judicature Act, 1877, the court held that it had no power to allow service of notice of a petition under the Trustee Relief Act 1847, (10 & 11 Vic. c. 96) on parties out of the jurisdiction (*ex parte Crawford*: *ex parte Bernard*).

Cases in which other orders have been made.

The cases unfortunately however are very conflicting: for in *re Hanay's trusts* and *re Bonelli's Electric Co.*, orders for service of a petition under this Act were made: and in *re the British Imperial Corporation* and *re Household Insurance Co.*, a summons under sections 100 and 165 of the Companies Act 1862 (to which rule 63 does not apply) on officials out of the jurisdiction was allowed to be served, the time for appearance being limited in the same way as a writ under Order XI. In all these cases, the decisions already quoted were, without being disapproved, 'felt to be a difficulty.' From these cases however, and from *Lester v. Bond*, *Lorton v. Kingston*, *re Alcan*, and *re Hodson*, the principle may possibly be deduced, that where the document to be served is virtually the initial proceeding in an action the service out of the jurisdiction will be allowed.

General principle.

Special provisions in statutes.

In all other cases therefore, unless in the statute under which the proceedings are brought, special provision is made for the service of the petition, or other initial process, on parties out of the jurisdiction, leave to serve it cannot be given:—Whether substituted service may be allowed in such cases is another matter, which we propose to consider in due course [*post* p. 231].

We find consequently in many statutes, directions given as to the course to be adopted when the opposite party is not in England. Such directions will be found under Companies [p. 153], Divorce [p. 293], Lunacy [p. 298], and Bankruptcy [p. 330]. Probate actions fall within the express terms of Order XI.

The most recent decision on the subject is *the Credits Gerun-*

*re Maugham*, 22 W. R. 748.  
*re Mewburn*, W. N. 1874. p. 156.  
*Potters v. Miller*, 31 W. R. 858.  
*Shurmur v. Hodge*, W. N. 1866. p. 304.  
*ex p. Crawford*, 2 Ir. Ch. Rep. N. S. 573.  
*ex p. Bernard*, 6 id. 133.  
*re Hanay's trusts*, L. R. 10 Ch. 275.  
*re Bonelli*, L. R. 18 Eq. 655.  
*re British Imp. Corp.*, 5 Ch. D. 749.  
*re Household Ins. Co.*, W. N. 1878. p. 26.  
*Lester v. Bond*, 1 Dr. & S. 392.  
*Lorton v. Kingston*, 2 Mac. & G. 139.  
*re Alcan*, 1 D. J. & S. 398.  
*re Hodson*, 17 Jur. 826.

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*Credits Gerundense v. Van Weede.*  
12 Q. B. D.  
171.  
*Van der Kan v. Ashworth.*  
W. N. 1884,  
p. 58.  
*Patorni v. Campbell.*  
12 M. & W.  
277.  
*Stevenson v. Anderson.*  
2 V. & B.  
407.

*deuse v. Van Weede* (followed in *Van der Kan v. Ashworth*) where the plaintiffs sued for goods in the possession of the defendant, and it appearing that a foreigner out of the jurisdiction claimed the right to the same goods and would probably sue the defendant in respect of them, the court gave him leave to serve an interpleader summons on the foreigner. It is difficult to reconcile this decision with either of the principles already discussed. In *Patorni v. Campbell*, Alderson, B., certainly doubted the existence of the right; but the question not having been argued in that case, Pollock, B., and Lopes, J., rested their decision on Lord Eldon's judgment in *Stevenson v. Anderson*. If the foreigner had commenced his action, it is clear that he would have been 'amenable to any order which the court might think right to 'make with a view of doing substantial justice between all the 'parties:' but as he had not commenced it, he could not be in any way subject to the jurisdiction, and the only way of making him amenable to it would be by the statutory right given by Order XI.; but it is evident that the defendant in the action already proceeding could not do this because he had no cause of action against him. The summons was said to be notice merely of the proceedings: but it was such a notice that, if he ignored it, the court declared his right to bring a future action would be barred. With the greatest submission, it is suggested that the arguments advanced by Lord Eldon are not in accordance with modern learning on the subject of jurisdiction. See too the decision of the learned Baron in *Potters v. Miller*, cited above.

Interpleader  
summons.

*Potters v. Miller.* 31  
W. R. 858.

Wherever in the following rules the words 'within the jurisdiction' are used, they are interpreted to mean 'within the territorial jurisdiction.' Service out of the jurisdiction will therefore not be allowed where a collision has occurred upon the high seas. In such cases the Judicature Act has not altered the old law: so far as the *res* is concerned, the court has jurisdiction *in rem* if it is arrested within the territorial jurisdiction: so far as the owner of the *res* is concerned, the court has no jurisdiction *in personam* under Order XI., he must therefore be served with a citation within the territorial jurisdiction. (Sir R. Phillimore, *re Smith; The Vivar.*) As to the limits of territorial jurisdiction, *R. v. Keyn*, deciding that it does not extend beyond three miles from the coast, is binding upon all the courts. (*Harris v. Owners of Franconia.*)

'Territorial  
jurisdiction.'

*re Smith.*  
1 P. D. 300.  
*the Vivar.*  
2 P. D. 29.  
*R. v. Keyn.*  
2 Ex. D. 63.  
*Harris v. Owners of Franconia.*  
2 C. P. D.  
173.

*Order II. Rule 4.*

O. ii. r. 4.  
Issue of writ  
for service  
abroad.

No writ of summons for service out of the jurisdiction, or of which notice is to be given out of the jurisdiction, shall be issued without the leave of a court or judge.

The notice here referred to is the formal notice prescribed in the Appendix of Forms : no other notice will be allowed. In *Stewart v. the Bank of England*, the Sultan of Turkey was one of the defendants : an application to issue the writ and serve a copy of it on the Turkish Ambassador by way of notice was refused. To have allowed such a notice would not only have been contrary to Order II., but also a violation of the Comity of Nations.

*Stewart v.*  
*Bk. of*  
*England.*  
*W. N. 1876,*  
*p. 263.*

*Rule 5.*

O. ii. r. 5.  
Form of writ  
for service  
abroad.

A writ of summons to be served out of the jurisdiction or of which notice is to be given out of the jurisdiction, shall be in one of the Forms Nos: 5, 6, 7, and 8 in Appendix A, Part I, with such variations as circumstances may require. Such notice shall be in one of the Forms Nos: 9 and 10 in the same Part, with such variations as circumstances may require.

The two  
applications  
for leave to  
issue and to  
serve.

It must be remembered that there are two applications, the first under Order II. for leave *to issue* the writ, which is different in form to the ordinary writ, the second under Order XI. after it has been issued, for leave *to serve* it out of the jurisdiction. The former application is to the Master under Order LIV. rule 12 ; 'a *verbal statement* is made to him of the nature of the action, whereupon, unless the case is one which requires to be brought under 'the personal consideration of the judge, a course which is 'adopted in all but very plain cases, the leave to issue it is 'indorsed upon it.'

O. liv. r.  
12 (b).

By Order LIV. rule 12 (b) the Masters in the Queen's Bench Division and the Registrars in the Probate, Divorce, and Admiralty Division have no jurisdiction in granting leave for *service* out of the jurisdiction of a writ, or notice of writ, of summons. This application must therefore be to the Judge in Chambers.

Generally  
combined.

The *affidavits* are only required under Order XI., on the application to the judge for leave to serve the writ. The two applications, for leave to issue and serve, may however be made simultaneously to the judge, supported by the necessary affidavit. (Hall, V.-C., *Stigand v. Stigand*.)

*Stigand v.*  
*Stigand.*  
*19 Ch. D.*  
*460.*

The writ will of course only be issued in cases where it will be allowed, under Order XI. rule 1, to be served out of the jurisdiction.

Chapter VIII. *Order VI. Rule 2.*

A writ for service within the jurisdiction may be issued and marked as a concurrent writ with one for service, or whereof notice in lieu of service is to be given, out of the jurisdiction; and a writ for service, or whereof notice in lieu of service is to be given, out of the jurisdiction may be issued and marked as a concurrent writ with one for service within the jurisdiction.

O. vi. r. 2.  
Concurrent writs, within and without the jurisdiction.

Where one defendant is a foreigner resident abroad the proper course is to take out a concurrent writ and serve a notice of it upon him. (*Beddington v. Beddington*; and cf: *Traill v. Porter*, p. 236.) A different practice however was adopted in *Keate v. Phillips*. A company in Scotland had been added to the writ as parties by amendment, the other defendants being within the jurisdiction. Sir G. Jessel, M.R., ordered the writ to be amended by adding the indorsement in the form of the writ for service out of the jurisdiction: having thus been issued by leave it was allowed to be served on the company.

*Beddington v. Beddington*.  
1 P. D. 426.  
*Traill v. Porter*.  
1 Ir. L. R. 60.  
*Keate v. Phillips*.  
W. N. 1878, p. 186.

*Order XI. Rule 1.*

Service out of the jurisdiction of a writ of summons or notice of a writ of summons may be allowed by a Court or Judge whenever—

O. xi. r. 1.  
When service allowed.

In *Eager v. Johnstone, re Eager* the Court of Appeal held that the case must absolutely come within this rule for leave to be granted, quite irrespective of whether it was a case in which service out of the jurisdiction would have been allowed prior to the Judicature Act. But in determining whether any case comes within the rule, the courts will give to the whole clause a wide construction so as not to prevent proper and reasonable cases from being brought within it. (Hall, V.-C., *Harris v. Fleming*.)

*Eager v. Johnstone*.  
31 W. R. 33.

(a) The whole subject matter of the action is land situate within the jurisdiction (with or without rents or profits);

Land in jurisdiction.

or (b) Any act, deed, will, contract, obligation, or liability affecting land or hereditaments situate within the jurisdiction, is sought to be construed, rectified, set aside, or enforced in the action;

Liabilities affecting such land.

Statements, in the nature of slander of title, made out of the jurisdiction concerning property within the jurisdiction do not come within the meaning of the rule.

In *Casey v. Arnott* the cause of action was a slander of title published in Ireland of a personal chattel in England (to which the rule of 1875 applied): Grove and Denman, JJ., held that the property situate within the jurisdiction must be physically or materially affected by the 'act, deed, will or thing' complained of; and that such slander did not come within the meaning of the

*Casey v. Arnott*.  
2 C. P. D. 24.



O. xi. r. 1. rule because it produced no effect upon the thing itself, but upon the minds of intending purchasers.

Relief  
against  
domiciled  
persons.  
Administra-  
tion.

or (c) Any relief is sought against any person domiciled or ordinarily resident within the jurisdiction;

Trusts.

or (d) The action is for the administration of the personal estate of any deceased person, who at the time of his death was domiciled within the jurisdiction, or for the execution (as to property situate within the jurisdiction) of the trusts of any written instrument, of which the person to be served is a trustee, which ought to be executed according to the law of England;

Contract.

or (e) The action is founded on any breach or alleged breach within the jurisdiction of any contract wherever made, which, according to the terms thereof, ought to be performed within the jurisdiction, unless the defendant is domiciled or ordinarily resident in Scotland or Ireland;

In *Harris v. Fleming* the contract was entered into in India, the breach within the jurisdiction in respect of which the service was allowed, was another contract entered into in this country in violation of the former one. *Harris v. Fleming*, 13 Ch. D. 208.

With regard to Scotland and Ireland, see the cases under rule 2.

Injunction.

or (f) Any injunction is sought as to anything to be done within the jurisdiction is sought to be prevented or removed, whether damages are or are not also sought in respect thereof;

Infringe-  
ment of  
patent  
abroad :  
goods sent  
by post to  
England.

In *Speckhart v. Campbell*, there had been an infringement of patent by a Scotch firm carrying on business at Aberdeen; they sold some of the goods to a person in Liverpool, sending them by post. Mathew, J., held that there was something to be done within the jurisdiction, which could be restrained by injunction, and therefore that the writ could issue. The argument for the defendant that the property in the goods passed on the sale of them, that consequently the post was the agent of the purchaser, and therefore that the infringement, if any, was in Aberdeen, was not approved by the learned judge. *Speckhart v. Campbell*, W. N. 1884, p. 24.

Co-defen-  
dants.

or (g) Any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction.

This rule, as we have pointed out on page 151, does away with the ordinary provisions in favour of absent defendants where one of several co-defendants has been already duly served within the jurisdiction. Thus in *Lightowler v. Lightowler*, the action was brought for specific performance by two defendants of an agreement to convey to the plaintiff their respective interests in a partnership formerly carried on by the plaintiff and defendants. One of the defendants had been served within the jurisdiction, *Lightowler v. Lightowler*, W. N. 1884, p. 8.

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VIII.**

the other was resident in the United States. Although the breach of the contract was committed out of the jurisdiction, Butt, J., made an order for service (presumably of a concurrent writ—[see p. 219], or of an amended writ [see p. 219]) on the co-defendant.

*re Luckie*,  
W. N. 1880,  
p. 12.

The same rule applies as to the service of counterclaim on new parties joined by it to the action (*Badham v. Nixon, re Luckie*). A difficulty arises here however from the fact that no writ is served, but only an endorsed counterclaim [Appendix B. No: 2].

*Swansea Co.*  
*v. Duncan*,  
1 Q. B. D.  
644.  
*Potters v.*  
*Miller*, 31  
W. R. 858.

The decision therefore proceeded on the authority of *the Swansea Shipping Co. v. Duncan* as to third party notices [see p. 230]. The contrary however was held in *Potters v. Miller*, the Court adopting the principle already noticed [p. 216] on the subject of service of documents other than writs. The appearance to such an endorsed counterclaim will of course not be limited to eight days, but will be governed by the usual rules, as to which see page 224.

*Rule 2.*

Where leave is asked from the Court or a Judge to serve a writ, under the last preceding rule, in Scotland or in Ireland, if it shall appear to the Court or Judge that there may be a concurrent remedy in Scotland or Ireland (as the case may be) the Court or Judge shall have regard to the comparative cost and convenience of proceeding in England, or in the place of residence of the defendant, or person sought to be served, and particularly in cases of small demands to the powers and jurisdiction, under the statutes establishing or regulating them, of the Sheriffs' Courts, or Small Debts Courts in Scotland, and of the Civil Bill Courts in Ireland, respectively.

O. xi. r. 2.  
Rule as to  
Scotland and  
Ireland.

This rule is much more clearly worded than the rule 1a of 1875. The enquiry as to whether a court competent to try the case exists at the defendant's place of residence is expressly limited to cases in which the writ is to be served in Scotland or Ireland. That indeed was the manifest interpretation of the old rule, but the practice in Chambers seems formerly to have required information upon this point to be given in the plaintiff's affidavit in support in all cases. But this evidently defeated the whole intention of the rule; the principle of assumed jurisdiction being adopted as a protection to plaintiffs, quite irrespective of the convenience and comparative cost to the defendant. If the plaintiff had a right under the English law to issue the writ, it certainly seemed absurd to take it away if there happened to be a court in the place of the defendant's residence.

But as between residents in different parts of the United King-

O. xi. r. 2.  
Rule as to  
Scotland and  
Ireland.

dom, the same argument does not apply; the rule indeed is one step towards the more complete consolidation of the three kingdoms.

In *ex parte McPhail* it was laid down that the application will certainly be refused when the plaintiff may have as complete a remedy by applying to the local court: and *cf.* *Wood v. McInnes* and *Tottenham v. Barry* [*post* p. 224].

In *Cresswell v. Parker*, an order for service in Scotland had been obtained; the Court of Appeal set aside the order on the ground that even if they had jurisdiction over the matter, which they doubted, yet that it was more convenient and proper, the action being against the trustees of a Scotch settlement who were all in Scotland where the property was also situate, that the instrument should be administered by a Scotch court.

Joint effect  
of rules 1 (e)  
and 2.

A most important question arises however as to the joint operation of rules 1 (e) and 2 with regard to defendants in Scotland or Ireland. It was argued in *Lenders v. Anderson*, that the discretion given and enquiry directed by rule 2 applied even in cases of contract, and was not taken away by the proviso in rule 1 (e). But the Court [Grove, J., and Huddleston, B.] held that this proviso was absolute, and that rule 2 applies only to the remaining subsections of rule 1.

Joint effect  
of rules 1 (c)  
1 (e) and 2.

Some confusion may possibly arise in a case coming within rules 1 (c), 1 (e), and 2: Huddleston, B., intimated that then the proviso would not be applicable; and this would seem to be the true solution of the difficulty.

Joint effect  
of rules 1 (f)  
and 2.

In *Speckhart v. Campbell*, which we have already discussed, Mathew, J., in Chambers considered the question of convenience; and decided that the action should be tried in England because nearly all the witnesses would be resident here.

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*exp.*  
*McPhail*.  
12 Ch: D.  
632.  
*Wood v.*  
*McInnes*.  
27 W. R. 49.  
*Tottenham*  
*v. Barry*.  
12 Ch: D.  
797.  
*Cresswell v.*  
*Parker*.  
11 Ch: D.  
601.

*Lenders v.*  
*Anderson*.  
12 Q. B. D.  
50.

*Speckhart*  
*v. Campbell*.  
W. N. 1884.  
p. 24.

### Rule 3.

O. xi. r. 3.  
Probate  
actions.

In Probate actions service of a writ of summons or notice of a writ of summons may by leave of the Court or Judge be allowed out of the jurisdiction.

### Rule 4.

O. xi. r. 4.  
Affidavit  
for leave.

Every application for leave to serve such writ or notice on a defendant out of the jurisdiction shall be supported by affidavit, or other evidence, stating that in the belief of the deponent the plaintiff has a good cause of action, and shewing in what place or country such defendant is or probably may be found, and whether such defendant is a British subject or not, and the grounds upon which the application is made; and no such leave shall be granted unless it shall be made sufficiently to appear to the Court or Judge that the case is a proper one for service out of the jurisdiction under this Order.

Discretion  
of judge.

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This last provision is most important; the court or judge in considering the application for service out of the jurisdiction is to exercise a discretion, and to consider whether the nature of the suit is such as to justify leave being granted. The case may be so plainly absurd, it may relate to such a subject matter, or to a controversy between persons so circumstanced, that the court may at once decline to act. Everything is to be left to the exercise of this judicial discretion, and the decision, subject of course to appeal, is final. The defence to the suit therefore must not call in question the propriety of the service. (*Preston v. Lamont.*)

O. xi. r. 4.  
Judge to consider nature of the suit.

*Preston v. Lamont.*  
24 W. R.  
928.  
*Great Australian Co. v. Martin.*  
5 Ch: D. 1.

The judgments delivered in *The Great Australian Mining Co. v. Martin* by Malins, V.-C., and by Lords Justices James, Baggallay and Bramwell in the Court of Appeal are most instructive, and show how careful the English courts are in requiring a very full affidavit, so that they may examine the nature of the case before they will sanction the hardship of bringing a man from the Antipodes perhaps, where there may be judicial tribunals before which he might be sued. Under the old consolidated orders of the Court of Chancery, when such an application was made, the

*Maclean v. Dawson.*  
4 De G. & J.  
150.

court would examine into the bill (*Maclean v. Dawson*): but when Order XI. came into operation it was necessary to provide for the new and additional circumstance that there was no longer a bill before the writ was issued, and therefore it was necessary that something should be provided which would correspond with the statement of facts which, under the old practice, the court had before it; therefore it was provided by rule 4 [rule 3 of 1875] that the applications must be supported by evidence, by affidavit or otherwise, showing

Affidavit to support application.

- i. the deponent's belief in the existence of the cause of action.
- ii. the place or country where the defendant is, or may probably be found;
- iii. whether the defendant is a British subject or not;
- iv. the grounds upon which the application is made.

Bramwell, J.A., thought that it would not be necessary for this affidavit to be made with the same rigour that used to be required in an affidavit to hold to bail; but that it ought to state, not generally, that there is a good cause of action, but specifically, what the cause of action is. It would appear that the words 'cause of action' should not be used by themselves, but the cause of action should be apparent from the facts set out in the affidavit.

O. xi. r. 4. If the action is *bonâ fide* there can be no hardship entailed ; the plaintiff, or anybody able to swear to it, can make the affidavit, and the person who has the conduct of the case should swear that he has every reason to believe that he can make it out. In the case above-mentioned the affidavit was insufficient, it therefore stood over to enable the plaintiff to file a fresh affidavit : this having been done, the court was of opinion that the facts disclosed by the new affidavit were sufficient, and leave was granted to serve the writ upon the defendant in Sydney.

With regard to the preparation of this affidavit the greatest strictness is required that the necessary information is given on all points which are really essential. (*Fowler v. Barstow*.) In *Wood v. McInnes*, the claim being for a small sum and the defendant in Scotland, leave to serve was refused, the affidavit giving insufficient information as to the existence of a local court having jurisdiction in the matter. And in *Tottenham v. Barry* leave was also refused, the comparative cost of proceeding in Ireland not being stated. It is to be intitled in the contemplated action unless leave to issue the writ has already been obtained ; otherwise it must be intitled in the contemplated action and also in the Judicature Acts. Hall, V.C., said that a deponent could be indicted for perjury if this were omitted (*Young v. Brassey* ; *Stigand v. Stigand*) [*cf.* the Irish Judicature Act, Order I., rule 4. *post* p. 235.]

*Fowler v. Barstow*,  
45 L. T.  
603.  
*Wood v. McInnes*,  
27 W. R. 49.  
*Tottenham v. Barry*, 12  
Ch: D. 797.

Heading of  
affidavit.

*Young v. Brassey*,  
1 Ch: D.  
277.  
*Stigand v. Stigand*,  
19 Ch: D.  
466.

### Rule 5.

O. xi. r. 5.  
Time for  
appearance.

Any order giving leave to effect such service or give such notice shall limit a time after such service or notice within which such defendant is to enter an appearance, such time to depend on the place or country where or within which the writ is to be served or the notice given.

Further  
information  
in affidavit.

In practice it is also necessary to give in the affidavit further information as to the number of days' post to the defendant's place of residence, and what the plaintiff considers to be a reasonable time within which appearance should be ordered. In the Code of Mauritius certain delays for effecting personal service on the defendant are allowed to the plaintiff, varying from two to eight months ; and in the Codes of France, Turkey, and Queensland lists are given of the times allowed to defendants to appear varying with the locality in which they are resident.

Foreign  
practice as  
to time.

In this country no such lists are in use, but it is believed that the time for the defendant's appearance is usually limited to about a fortnight beyond double post-time.

The order should provide for service of interrogatories if re-



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VIII.

quired, and for an injunction if necessary, and if the right to it is made out by the affidavit (*Young v. Brassey*). O. xi. r. 5.

*Young v. Brassey.*  
1 Ch. D.  
277.  
*the Emma.*  
34. L. T. 742.

But an application may be made for discovery afterwards (*the Emma*), the principle being that the defendant, once made subject to the jurisdiction of the court, is bound to obey subsequent orders made upon him during the progress of the action.

As to the defendant's appearance within the time limited by the order, the rules of Order XII apply: that is to say, the defendant has to give his address for service, either upon his solicitor or himself (should he appear in person) within three miles from the principal entrance of the Central Hall at the Royal Courts of Justice. Address for service. O. xii. rr: 10, 11.

At this address all subsequent papers may be left, sufficient time being always allowed to enable the defendant to put in his pleadings, or to obey an order for discovery, if he remain out of the jurisdiction. Pleadings.

## Rule 6.

When the defendant is neither a British subject, nor in British dominions, notice of the writ, and not the writ itself, is to be served upon him. O. xi. r. 6. Notice of writ.

*Beddington v. Beddington.*  
1 P. D. 426.

It will be noticed first that under the English procedure notice of the issue of the writ is to be given to the defendant, in lieu of actual service of the writ of summons upon him when he is a foreigner out of the jurisdiction; and the reason of this was pointed out by Sir James Hannen in *Beddington v. Beddington*:—‘Service of process upon a foreigner not a subject of Her Majesty in another country may involve unpleasant questions of jurisdiction, whereas if it were not formally served upon, but only notice of the proceedings given to, such foreigner, no such consequences can arise.’ ‘Foreign countries do not like writs served upon their subjects’ (Jessel, M.R., *Fowler v. Barstow*). It must be remarked that this provision has been omitted in many of the Colonies in which the Judicature Acts have been adopted, nor is any provision resembling it to be found in the American or European Codes of Procedure. In many foreign countries however the writ as understood in this country is not used, the initial document being more in the nature of the English ‘notice of writ.’

*Fowler v. Barstow.*  
45 L. T. 603.

With regard to the Colonies in which the provision has not been adopted the writ itself is presumably served out of the jurisdiction.

*Bacon v. Turner.*  
34 L. T. 64.

In *Bacon v. Turner* the court held that the service of the notice in lieu of writ was inappropriate in the case of an English woman married to a German and residing abroad with him: she could

O. xi. r. 6. not be considered a foreigner, and therefore the writ itself would have to be served. This decision does not seem to be in accordance with the general principles regulating the wife's domicile and nationality [see p. 279].

English  
subject.

If the absent defendant is an English subject, or it is presumed, a foreigner in English territory out of the jurisdiction of the courts in England, the writ [Rules of Court 1883, Appx: A. Pt. I. No: 5] will be used and may be actually served upon the defendant :

Foreigner.

(*Westman v. Aktiebolaget* ; *Beddington v. Beddington*) but where the defendant is a foreigner in foreign territory, Form No: 9, that is to say, the notice of writ in lieu of the service of the writ will be used (*re Howard*, *Padley v. Camphausen*).

*Westman v. Aktiebolaget*,  
1 Ex. D.  
237.  
*Beddington v. Beddington*,  
1 P. D. 426.  
*re Howard*,  
48 L. J. Ch.  
364.

he two  
applications.

In *Westman v. Aktiebolaget, etc.*, *Snickarefabrik* the writ itself was served abroad ; the court set aside the service, but refused to interfere with the writ itself, that having been properly issued, allowing notice of it to be given. Kelly, C.B., dwelt upon the importance, which has already been noticed, of keeping distinct the two applications :—‘ The first point is not whether the action ‘ is maintainable, but whether a writ may lawfully issue ; then if ‘ the defendant is a British subject he may be lawfully served, but ‘ if a foreigner (in foreign territory) to give notice of it is all that ‘ can be done. The notice is in effect an official intimation that ‘ a writ has issued in this country.’

It must however be remembered that if the defendant is out of the jurisdiction it is perfectly optional whether the plaintiff adopt the advantages given him by Order XI he may issue an ordinary writ and serve it on the defendant when he gets the chance of doing so in this country. (*The Helenslea*).

*the Helenslea*,  
7 P. D. 57

### Rule 7.

O. xi. r. 7.  
Notice.

Notice in lieu of service shall be given in the manner in which writs of summons are served.

What writ  
to be used  
where notice  
only to be  
served.

Where *notice of the writ* is served abroad, the writ used is as before Form No: 5 ; and it is understood to be the practice, although the Act does not seem to require it, to send this writ out to the agent abroad with the notice of writ, in order that the defendant may see it.

Chancery  
practice.

The Chancery Courts will follow the Common Law form when leave is obtained to serve notice of writ in lieu of writ (*Bustros v. Bustros*).

*Bustros v. Bustros*,  
14 Ch. D.  
849.

Petition for

The court has no power under Order XI, nor under 20 and

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21 Vic. c. 85, s. 42, to order service out of the jurisdiction of a petition for restitution of conjugal rights (*Firebrace v. Firebrace*).

restitution of conjugal rights.

*Firebrace v. Firebrace*.  
26 W. R. 617.  
exp: *Blain, re Sawers*.  
12 Ch. D.  
522.

A judgment by default under Order XI is not an act of bankruptcy (*ex parte Blain, re Sawers*).

Act of bankruptcy.

*Hastings v. Hurley*.  
W. N. 1881,  
p. 39.

There seems some doubt whether, the service of the writ or of the notice having been effected, the provisions of Order IX, rule 15, as to the indorsement of the service, apply. In *Hastings v. Hurley*, the writ was served in Texas, and the indorsement not having been made, the time for making it was extended. But in *Fish v. Chatterton* Vice-Chancellor Bacon thought that, there being no mention of the subject in Order XI, the rule did not apply. An affidavit, duly verified, proving the service had been sworn and returned, but no indorsement had been made on the writ: the statement of claim was nevertheless allowed to be filed.

Affidavit of service.  
Indorsement on writ, whether required.  
O. ix. r. 15.

*Fish v. Chatterton*.  
W. N. 1882,  
p. 145.

## Order XVI. Rule 13.

Where a defendant is added or substituted, the plaintiff shall, unless otherwise ordered by the Court or Judge, file an amended copy of and sue out a writ of summons, and serve such new defendant with such writ or notice in lieu of service thereof in the same manner as original defendants are served.

O. xvi. r. 13.  
Service on defendants added or substituted.

See the cases cited under Order XI, rule 1 (g) [*ante* p. 220].

The Judicature Act has introduced in the matter of service out of the jurisdiction an important change in the procedure as it existed under the Common Law Procedure Act, 1852.

The conclusion of section 18 of that Act is as follows:—

Provided always, that the plaintiff shall and he is hereby required to prove the amount of the debt or damages claimed by him in such action, either before a jury upon a writ of inquiry, or before one of the Masters of the Superior Courts, in the manner hereinafter provided, according to the nature of the case, as the Court or Judge may direct; and the making such proof shall be a condition precedent to his obtaining judgment.

C. L. P. Act,  
s. 18.

This provision has been omitted in the Judicature Act; the writ and notice of writ conclude like the ordinary writ: ‘and take notice ‘that in default of your so doing the plaintiff may proceed therein, ‘and judgment may be given in your absence.’

The writ which is to be served, or of which notice is to be given, out of the jurisdiction may however be specially indorsed under Order III, rule 6, and an application made to sign judgment under Order XIV.

Signing judgment under O. xiv.  
O. iii. r. 6.

This indorsement, coupled with the affidavits required under Orders XI and XIV, supply the place of the evidence given upon a writ of inquiry or before one of the Masters under the old Act and unless the defendant obtain leave to defend, the plaintiff will be empowered to sign judgment against him. As to the old writ of inquiry see *Messin v. Lord Massarene*.

*Messin v.  
Massarene.*  
4 T. R. 493.

Application  
to set aside  
service of  
writ.

The defendant may apply to the court to set aside either service of the writ or of the notice. The grounds for this application sufficiently appear from the cases cited above. The defendant may go into evidence to show that there is no forum, or he may raise the question of relative convenience as to the place of trial ; but he is restricted to this and may not go into the merits. That is to say, the affidavits in reply (as to the right to use which *Foley v. Maillardet* was followed, and *the Great Australian Mining Co. v. Martin* overruled) cannot go beyond showing that the court had no jurisdiction to make the order (*Fowler v. Barstow*). In this case, which was an action for deceit for false representations made within the jurisdiction, the defendant said that the plaintiff's affidavit was utterly untrue, and in his affidavit in reply he did not deny a single material statement. It would seem also, the issue of the writ being by leave and being regulated by the same rules as the service of it (that is by rule 1), that the defendant may also apply to set aside the issue of the writ itself.

*Foley v.  
Maillardet.*  
12 W. R.  
355.  
*Great  
Australian  
Co. v.  
Martin.*  
5 Ch. D. 1.  
*Fowler v.  
Barstow.*  
45 L. T. 603.

And issue  
of writ.

Two cases  
under the  
rules of 1875.

This chapter would be incomplete without a notice of two cases decided under the rules of 1875, but which in consequence of the change in those rules have no place in the foregoing consideration of the present practice.

In *McStephens v. Carnegie*, a first mortgagee claiming against the mortgagor and puisne incumbrancers found part of the property in the hands of a firm of Antwerp merchants who laid claim to it because the second mortgagee owed them money. Service of notice was allowed, the merchants being added as parties to the action because it was the first mortgagee's right which was paramount to their claim which was interfered with ; it could therefore make no difference where the contract between the second mortgagee and the merchants was entered into ; (personalty is now omitted from rule 1).

*McStephens  
v. Carnegie.*  
42 L. T. 15.

In *Bree v. Marescaux*, slander was uttered on board a ship on the high seas, which, being repeated by the captain to the company on the vessel's return to England, led to the plaintiff's dismissal : the defendant being then in Jamaica, leave to serve the writ

*Bree v.  
Marescaux.*  
7 Q. B. D.  
434.

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was refused, the act complained of not having been done within the jurisdiction, and the original utterer of the slander not being liable to the plaintiff for its repetition ; (the recovery of damages for any act is now omitted from rule 1).

The forms now in use are as follow :—

Forms.

*Appendix K. No: 20.*

Judge's order for service out of the jurisdiction.

*Appendix A. Part I. No: 5.*

Writ for service out of the jurisdiction, or where notice in lieu of service is to be given out of the jurisdiction.

*No: 6.*

Specially-indorsed writ for service out of the jurisdiction.

*No: 7.*

Writ from District Registry for service out of the jurisdiction.

*No: 8.*

Specially-indorsed writ from District Registry for service out of the jurisdiction.

*No: 9.*

Notice of writ in lieu of service to be given out of the jurisdiction.

[Writ to be used with this form, Appendix A.  
Part I. Nos: 5 or 6.]

*No: 10.*

Notice of writ in lieu of service to be given out of the jurisdiction—District Registry Form.

[Writ to be used with this form, *id.*: Nos: 7 or 8.]

It will be seen from these forms that the indorsement on the writ, whether ordinary or special, is copied in full into the *notice of writ*, but there is nothing to draw the absent foreigner's attention to the provisions of Order III, which enable the plaintiff in 'proceeding therein' to sign judgment by default when a specially indorsed form is used, an injustice which might easily be remedied. An absent British subject is presumed to know the law, so too a foreigner within the dominions, but an absent foreigner can hardly be supposed to be conversant with our summary proceeding under Order XIV.



*Third-Party Notices.**Order XVI. Rule 48.*

O. xvi. r. 48.  
Notice to  
third party  
in cases of  
contribution.

\* \* \* \* \*

A copy of such (third-party) notice shall be filed with the proper officer and served on such person according to the rules relating to the service of writs of summons.

\* \* \* \* \*

and therewith shall be served a copy of the statement of claim, or if there be no statement of claim, then a copy of the writ of summons in the action.

Third party  
out of the  
jurisdiction.

This provision [R. S. C. 1875. O. xvi. r. 18] was held by Jessel, M.R., in *Swansea Shipping Co. v. Duncan* to relate to all the rules as to service of writs, and therefore, when the third party is out of the jurisdiction, the service of the notice is to conform to the rules of Order XI: the time for appearance is therefore to be limited by the order giving leave to issue the notice. *Swansea Co. v. Duncan*, 1 Q. B. D. 644.

But a question then arises, which has not been decided yet, should not rule 1 also apply; that is to say, should not the contribution or indemnity depend on a cause of action falling within the subsections of that rule, a cause of action in respect of which if an original action had been brought, service of the writ out of the jurisdiction would have been allowed? possibly however rule 1 (g) would be applicable, and thus all cases would be included independently of this consideration.

In *Hutchison v. Colorado Mining Co.*, an application was made *ex parte* to serve the notice out of the jurisdiction. Mathew, J., in Chambers adjourned the summons for the attendance of the plaintiff. The leave to serve was refused because the plaintiff objected, the learned judge holding that he could not make the order against his wish, as it would of necessity tie the action up for a considerable time. He also doubted whether the question were really one of indemnity. *Hutchison v. Colorado Co.*, W. N. 1884, p. 40.

Distinction  
between  
third-party  
procedure  
and inter-  
pleader.

This question must not be confused with that of interpleader, which we have already dealt with [p. 217]: third-party procedure being in effect the consolidation with an action already brought against the defendant, of a second action which he would be obliged to bring: interpleader, of a second action which will in all probability be brought against him.

*Substituted Service.**Order IX. Rule 2.*

O. ix. r. 2.  
Personal  
service.

When service is required the writ shall, wherever it is practicable, be served in the manner in which personal service is now made; but if it be

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made to appear to the court or a judge that the plaintiff is from any cause O. ix. r. 2. unable to effect prompt personal service, the court or judge may make such order for substituted or other service, or for the substitution for service of Substituted notice by advertisement or otherwise for service, as may be just. service.

It is sometimes said that 'substituted service' is another means of effecting service on absent defendants [see Westlake—International Law, 2nd ed: § 171 *et seq.*]. There seems to be no doubt however that this is not accurate, not only from the relative position of the two orders, but also from their titles: the confusion arising from the substitution of service of notice for service of writ provided by Order XI, in the case of absent foreigners, and the technical 'substituted service' provided by Order IX: the introduction of the words 'by advertisement or otherwise' in the rule of 1883, tends to remove this confusion. Substituted service is not another way of reaching absent defendants.

The natural construction of the two orders seems to be this: if a defendant who is within the jurisdiction cannot be served personally, an order for service by advertisement may be obtained: but whenever a defendant, whether subject or alien, is out of the jurisdiction, then the provisions of Order XI apply. Joint construction of Orders IX and XI.

There are very few reported cases on the subject:

*Armitage v. Fitzwilliam.*  
W. N. 1875,  
p. 238.

In *Armitage v. Fitzwilliam* it may well be doubted whether the procedure adopted was correct; an order was made for substituted service on one of the defendants who was in India, his solicitors having refused to accept service on the ground that they had no instructions to do so: The service of the *ordinary* writ was allowed at his office on his managing clerk.

But it is at once evident that the simple statement of the joint operation of the two rules just given does not cover all the cases that may arise.

It may be impossible to effect personal service either of the writ for service out of the jurisdiction, or of the notice in lieu thereof: It then becomes a question whether a further order under Order IX, rule 2, cannot be obtained. In *Meek v. Michaelson* such an order was made. If this procedure be correct, as it is conceived it is, it must be borne in mind that 'from any 'cause' in rule 2, cannot include absence abroad; and 'prompt' must be taken subject to the time required for sending the writ, or notice of it, to the foreign country [see also *Nelson v. Pastorino*]. Case when personal service of writ abroad cannot be effected.

*Meek v. Michaelson.*  
W. N. 1876,  
p. 111.

*Nelson v. Pastorino.*  
49 L. T. 564.

*re Maugham.* 22  
W. R. 748.  
*re Bonelli.*  
L. R. 18  
Eq. 655.

In two of the cases discussed above as to the service out of the jurisdiction of documents other than writs, orders for substituted service were made (*re Maugham*; *re Bonelli's Electric Co.*). In cases of petitions, &c. noticed on p. 216.

The question however seems to require more consideration than was given to it: because the fact that the absent party cannot be touched by service on account of his absence from the kingdom, shows that he cannot be brought under the jurisdiction of the courts; and if he cannot be brought under that jurisdiction in the usual way, *a fortiori* he cannot be brought under it in an unusual way.

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### *Service on Corporations.*

Foreign  
companies.

In *Ingate v. Austrian Lloyd's*, followed in *Armstrong v. Elbinger*, it was held that foreign corporations did not come within sections 18 and 19 of the Common Law Procedure Act 1852; but the words of Order XI are wider, and it is now settled that the rules relating to absent defendants under that order apply in all respects to foreign companies. Thus a foreign company not trading in

*Ingate v. Austrian Lloyd's*.  
6 W. R. 659.  
*Armstrong v. Elbinger*.  
23 W. R. 94.

English  
companies.

O. ix. r. 7.

England may be served abroad with notice of the writ (*Scott v. Royal Wax Candle Co.*): but where a person residing abroad carries on business in England as a firm, *i.e.* with '& Co.:' after his name, he may be sued here, the writ being served at the place of business on the head officer here, under Order IX, rule 7: (*O'Neil v. Clason*; *Newby v. Van Oppen*. *cf.* Lord St. Leonards in the *Carron Iron Co. v. Maclaren*, cited by Blackburn, J.). The writ used is of course the ordinary writ, and this case therefore ceases to be influenced by the provisions of Order XI. The defendant may be out of the jurisdiction, but the firm is within the jurisdiction, and carries on its business there: therefore the simple rules for serving English companies apply. In *Palmer v. Gould's Co.* Field, J., in Chambers reversed the decision of the Master who had set aside the writ and service in the action, because the cause of action arose abroad: as the learned Judge pointed out this had nothing to do with the question, the case not coming within Order XI. It is different, however, if the foreign company has only employed an agent here who has entered into a contract for them; the company must then be served abroad in the usual way under Order XI, with the writ if an English company, with a notice of writ if a foreign company (Blackburn, J.) Further,

*Scott v. Royal Wax Candle Co.*:  
1 Q. B. D.  
404.

*O'Neil v. Clason*.  
46 L. J.  
C. P. 191.  
*Newby v. Van Oppen*.  
L. R. 7  
Q. B. 293.  
*Carron Co. v. Maclaren*.  
5 H. L.  
Ca. 416.  
*Palmer v. Gould's Co.*:  
W. M. 1884.  
p. 63.

Agent of  
foreign  
companies.

Head officer.

the writ or notice of writ must be served upon the head officer and not on an ordinary clerk (*Mackreth v. Glasgow and S. W. Ry. Co.*). The criterion as to his power of accepting service being as stated by *Bramwell B.*, —The person may be served if he could have been served were the company an English one.

*Mackreth v. Glasgow Ry. Co.*:  
L. R. 8  
Ex. 149.

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The form of the actions, will be governed by English Law : see  
*Bullock v. Caird*, ante p. 208.

*Bullock v.  
Caird.*  
L. R. 10  
Q. B. 276.

While these pages have been passing through the press the question has been raised whether service out of the jurisdiction will be allowed when the cause of action is a foreign judgment.

Enquire whether service of writ out of the jurisdiction should be allowed where cause of action is a foreign judgment.

It is clear that, when the defendant is domiciled or ordinarily resident within the jurisdiction, the service will be allowed under the words 'any relief' in Order XI, rule 1 (c). But when the defendant does not come within this category the question is not so easily answered. The only subsection under which it could be allowed is (e), relating to contracts : and certainly the old cases which we have already considered under the head of 'the cause of action,' in chapter i., do adopt the hypothesis of the implied contract. We have endeavoured to show that this notion is entirely at variance with the general theory of the subject. But even if that hypothesis were admitted, the implied contract was entered into abroad, the breach was abroad, and the defendant is abroad : clearly therefore the case does not come within the subsection.

Considered on the old hypothesis of the implied contract. [cf. pp. 22 et seq.]

From a theoretical point of view however the question is an interesting one. We have pointed out that the reason for the existence of the comity on which the enforcement and recognition of a foreign judgment depends, is the want of power in the sovereign authority of the State in which it has been pronounced to enforce it, and the presence of the judgment debtor in the jurisdiction of the State in which the action upon it is brought.

Considered theoretically.

It may be said that the object of this action is to obtain execution against the debtor's property ; that if he had no property in the State there would be no object in bringing the action ; but that if he has property the action should be allowed to be brought even though he cannot be served with a writ in the jurisdiction. In other words that the request, or *commission rogatoire*, which lies at the root of the whole question [p. 12] depends, not on the presence of the debtor, but of his property, within the foreign State.

We have seen however [p. 18] that some application to the courts of the foreign State is absolutely essential ; and that, certain defences being admitted, this application should not be decided upon *ex parte*. Now the power to summon a defendant depends on his presence, for however short a period, within the

The general principles of jurisdiction do not seem to warrant it.

jurisdiction [p. 131]; and the possession of property within the jurisdiction does not give the power to serve a writ out of the jurisdiction except in the cases provided by Order XI, rules 1 (a), (b). It seems therefore impossible to accept the view that in an action on a foreign judgment, service out of the jurisdiction should be allowed.



## IRELAND.

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VIII.

The Judicature Act for Ireland, based upon the same principles as the English Acts of 1873 and 1875, was passed in 1877—40 & 41 Vic: c. 57.

It is believed that the Irish Judges have not at present considered the advisability of adopting the English Rules of Court, 1883.

*40 & 41 Vic: c. 57, s. 33.*

Whenever application shall be made for leave to serve any document by which a cause may be commenced upon a defendant resident out of the jurisdiction of the Supreme Court, whether by serving such defendant personally or by substituting service upon another person for him, the Court or Judge to whom such application shall be made shall have regard to the amount or value of the claim or property affected, and to the comparative cost and convenience of proceedings in Ireland, or in the place of the defendant's residence; and no such leave shall be granted without an affidavit stating the particulars necessary for enabling the Court or Judge to exercise a due discretion in the manner aforesaid.

40 & 41 V.  
c. 57, s. 33.  
Service out of  
jurisdiction,  
or sub-  
stituted  
service.

Affidavit.

It is important to notice first, that this section distinctly recognises 'substituted' as well as personal service when the defendant is out of the jurisdiction: secondly, that it relates to 'any document by which a cause may be commenced,' 'cause' being defined by section 3, to 'include any action suit or other original 'proceeding between a plaintiff and a defendant:' the difficulty to which we have referred as existing in England by Order XI being limited to writs does not therefore arise.

*Order I. Rule 3.*

No writ of summons for service out of the jurisdiction, or of which notice is to be given out of the jurisdiction, shall be issued without leave of a Court or Judge.

O. i. r. 3.  
writ for  
service  
abroad.

*Rule 4.*

The application for leave shall be granted on an affidavit entitled a between the parties to the intended action, and, 'In the matter of the 'Supreme Court of Judicature Act (Ireland) 1877.'

O. i. r. 4.  
form of  
affidavit.

*cf: Blake v. Lever.*

*Blake v.  
Lever.  
61r: L. R.  
476.*

*Rule 5.*

A writ of summons to be served out of the jurisdiction, or of which notice is to be given out of the jurisdiction, shall be in Form No: 3, in Part I of Appendix (A) hereto, with such variations as circumstances may require.

O. i. r. 5.  
form of writ.

Such notice shall be in Form No: 4 in the same Part, with such variations as circumstances may require.

Forms Nos: 3 & 4, Part I, Appendix (A) :—[English Act, Forms Nos: 5 & 9, Part I, Appendix (A).].

### *Order V. Rule 2.*

O. v. r. 2.  
concurrent  
writs within  
and without  
jurisdiction.

A writ for service within the jurisdiction may be issued and marked as a concurrent writ with one for service, or whereof notice in lieu of service is to be given out of the jurisdiction; and a writ for service, or whereof notice in lieu of service is to be given out of the jurisdiction, may be issued and marked as a concurrent writ with one for service within the jurisdiction.

Concurrent  
writs to be  
issued when  
different  
times for  
appearing  
allowed.

Whenever different times for appearing have to be allowed to different defendants, the proper course is to issue concurrent writs (*Traill v. Porter*). *Traill v. Porter*,  
1 Ir. L. R.  
60.

### *Order VIII. Rule 3.*

O. viii. r. 3.  
copy of order  
to be served  
with writ.

Whenever an order shall be made by the Court or Judge to substitute service or to serve a party personally out of the jurisdiction, a copy of the order directing such mode of service shall be served along with the writ.

### *Order X. Rule 1.*

O. x. r. 1.  
service out  
of the  
jurisdiction :  
in what  
cases.

Service out of the jurisdiction of a writ of summons or notice of a writ of summons, whether on a defendant to the action, or a third party ordered to be served, may be allowed by the Court or a Judge whenever the whole or any part of the subject matter of the action is land or stock, or other property situate within the jurisdiction, or any act, deed, will or thing affecting such land, stock or property, and whenever the contract which is sought to be enforced or rescinded, dissolved, annulled or otherwise affected in any such action, or for the breach whereof damages or other relief are or is demanded in such action was made or entered into within the jurisdiction, and whenever there has been a breach within the jurisdiction of any contract wherever made, and whenever any act or thing sought to be restrained or removed, or for which damages are sought to be recovered, was or is to be done or is situate within the jurisdiction.

### *Rule 2.*

O. x. r. 2.  
affidavit to  
obtain leave.

Every application for an order for leave to serve such writ or notice on a defendant out of the jurisdiction shall be supported by evidence, by affidavit, or otherwise, showing in what place or country such defendant is or probably may be found, and whether such defendant is a British subject or not, and the grounds upon which the application is made.

### *Rule 3.*

O. x. r. 3.  
time for  
appearance.

Any order giving leave to affect such service or give such notice shall limit a time after such service or notice within which such defendant is to enter an appearance, such time to depend on the place or country where or within which the writ is to be served or the notice given, and such leave may be given by the same order by which leave is given to issue the writ of summons

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for service out of the jurisdiction, or of which notice is to be given out of the jurisdiction.

**Rule 4.**

Notice in lieu of service shall be given in the manner in which writs of summons are served, O. x. r. 4.  
service of  
notice in lieu  
of writ.

The English Order XI, r. 2, relative to service of the writ in Probate actions is omitted ; and also Order LIV, r. 12 (b), relative to the jurisdiction of the Masters of the Courts in the matter. Probate  
actions.

The practice of the Irish Courts before the Judicature Act has been treated in a paper on International Jurisdiction (ii) in the Scottish Journal of Jurisprudence, vol: xxii., p. 292.

## SCOTLAND.

Right of  
foreign  
plaintiff  
to sue.  
'Forty days  
rule.'

Resident  
defendant.

Non-resident  
defendant.

Edictal  
Citation.  
Old form.

New form.

Abstract  
to be  
registered.

Three kinds  
of registers.

Letters of  
supplement.

The first question in Scotch procedure which requires elucidation is what may be called the 'forty days rule.'

This rule has no reference to the defendant, but applies only to a foreigner's right to sue in the Scotch courts: it was much discussed in *Ringer v. Churchill*, and may be shortly stated to be as follows: no residence whatever is required to enable a person to pursue a defender who is amenable to the jurisdiction by residence; but, if required by such defender, he would be bound to sist a mandatory, so that if the defender were successful in the action there might be some party within reach who could be made responsible for any expenses awarded against the pursuer:—If the defendant is not amenable to the jurisdiction by residence then by means of that occasional and temporary domicile which results from a residence of forty days, any person has a right to all the benefits of Scotch law as a litigant in the matter of any action.

The second question is the Scotch method of summoning absent defendants before the courts which is by Edictal Citation. The ancient form was by citation published at the Market Cross in Edinburgh and the Pier and Shore of Leith: but this was discontinued by the Judicature Act, 6 G. IV, c. 120, and the modern form substituted, which in the Court of Session is as follows:—

Edictal citations, charges, publications, citations and services as against persons furth of Scotland are to be done and performed by delivery of copies at the record office of the Keeper of the Minute Book, or by a messenger at arms putting it in the box marked 'Edictal Citations' at the New Register House.

An abstract of the copy so delivered, specifying the time of service, the nature of the writ, the names and designations of the parties, and the day against which the defender is called to give obedience or to make appearance is then to be registered in the 'Register of Edictal Citations.'

Three separate registers are kept: one for citations on summonses and orders of service against parties furth of Scotland; another for citations by virtue of letters of supplement to persons furth of Scotland to appear before any of the inferior courts, (in which case they are cited, not as principal defenders, but merely for their interest): and a third for all charges, intimations and

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*Ringer v.  
Churchill.*  
Sc: Sess:  
Ca: 2nd  
Ser: 11. p.  
307.

[Bell's  
Dictionary  
of the Law  
of Scotland.  
Mackay's  
Practice of  
the Court of  
Session.]

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publications to persons furth of Scotland by virtue of letters other than summonses passing the Signet.

The abstracts are printed and the record is at all times open for inspection.

If two or more defenders are to be cited edictally, delivery at the office of one copy only is sufficient, 'provided that such copy bear upon its face that it is delivered for all and each of such persons.' (Act of Sederunt, 11 July, 1828, s. 22). Two or more  
defenders.

A person is held to be furth of Scotland after an absence of forty days from his usual place of residence. (Act of Sederunt, 14 Dec., 1805). Furth of  
Scotland.'

Although there is no provision in the Acts of Sederunt for giving notice of the citation to the defender, yet it is believed, that if his residence furth of Scotland is known, it is the practice to inform him of the citation having been issued.

With regard to the cases in which Edictal Citation may be made use of, the first rule, relating to immoveable property, was thus formulated in *Fraser v. Fraser*:—the Scotch courts base jurisdiction on the beneficial possession, whether natural or civil, of immoveable estate within the realm whether permanently or temporarily, upon a good title of possession. Rules  
of Edictal  
Citation,  
Immove-  
ables.

*Fraser v.  
Fraser.*  
8 Macph:  
404.

The second rule, relating to moveables, is stated by Erskine to be as follows:—'When a foreigner who is actually abroad hath no other than moveable effects within this kingdom, he is accounted so little subject to the jurisdiction of its courts that no action can be brought against him till these effects be attached by an arrestment called *arrestum jurisdictionis fundandæ causæ*.' This is what is known as Scotch arrestment, which was thus explained by the Lord Justice-Clerk in *Parken v. the Royal Exchange Ass: Co*:— Moveables.  
  
Scotch  
arrestment.

*Parken v.  
Royal Ex:  
Ass: Co:*  
Sc: Sess:  
ca: 2nd Ser:  
VIII. p. 365.

'Jurisdiction is as extensive when constituted by arrestment as by personal service and domicile, if the cause of action is competent at all in a Scotch court. The party is amenable to the Scotch court in the one case as well as in the other, and if we can entertain the ground of action our jurisdiction is the same in both cases, though its consequence extends only to the funds attached. On the other hand as jurisdiction created by arrestment is necessarily limited in execution, cases may more frequently occur in such actions in which proceedings ought to be stayed until the questions are tried in tribunals which are more appropriate, exactly because the execution can be more complete and more appropriate to the nature of the demand or interests at issue.' And again in the same case by Lord Moncrieff:—'This jurisdic-



'tion applies to the precise case of actions against defenders domiciled in another country and founded on personal contracts, 'however clearly entered into or concluded in that other country.'

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Again from *Douglas v. Forrest*, it appears that an absent defendant may be cited in respect of debts contracted in the country whilst the debtor resided in it: on the other hand it was decided in *Grant v. Pedie*, that the Scotch courts had no jurisdiction against a Scotchman *originis causâ* who was born a Scot, but who had quitted Scotland permanently and become resident abroad.

*Douglas v. Forrest*,  
4 Bing: 686.

*Grant v. Pedie*,  
1 Wils: &  
Sh: 720.

No  
jurisdiction  
*originis*  
*causâ*.

The whole question was elaborately discussed in the *London and North Western Railway v. Lindsay*, and the law thus summarised by Lord Eldon, C.—'There is a law in Scotland under 'which if the defender has real estate in Scotland, or if he has 'goods in Scotland, or if a contract upon which a party sues be a 'contract formed in Scotland, that, following particular forms, 'these circumstances would undoubtedly give a jurisdiction to the 'Court of Session.' In all other respects *actor sequitur forum rei* is a principle of Scotch law. The property however must not be so small as to make the seizure illusory, although this raises a question which is difficult to settle. 'No doubt if a person has 'heritable property in Scotland that entitles the court to exercise 'jurisdiction over him; nevertheless in *Douglas v. Jones* the possession of a lease of a house in Glasgow was held not to be 'sufficient, but the seizure of unliquidated debts to be ascertained 'by accounts was.'

*L. & N. W. R. v. Lindsay*,  
H. L. ca:  
99.

*Douglas v. Jones*,  
9 Shaw & D.  
856.

The practice has been very fully treated in a paper on International Jurisdiction (iii & iv) in the Scottish Journal of Jurisprudence, vol: xxii. pp: 358, 403. The author there states that this remedy of arrestment 'has been pushed to an extreme length, for 'the courts accept a jurisdiction to deal with the largest claims, 'although only the most insignificant sum has been arrested.' A remarkable instance of the exercise of the power is found in the case of *Longworth v. Hope*, in which the pursuer, by having arrested some trifling sums in Scotland, was enabled to sue the editor of the Saturday Review for damages for libel, although the judges admitted that the mere fact of publication in Scotland would not have been sufficient to found proceedings in the *locus delicti* against the foreigner who had published.

*Longworth v. Hope*,  
3 Macph:  
1049.

Extent of the  
jurisdiction.

In action  
for libel.

Reconven-  
tion.

It seems that Edictal Citation is also available under the doctrine of reconvention, which somewhat resembles the English counterclaim: if a person out of the jurisdiction avails himself of the Scotch courts, he may be edictally cited by the defender as to a cause of action collateral to the original cause of action.

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VIII.**

*Scruton v.  
Gray.*  
Morr: 4822.  
*Cameron v.  
Chapman.*  
16 Shaw 907.

In *Scruton v. Gray* it was held not applicable to actions of status: and in *Cameron v. Chapman*, that it ceased on the death of the defender and was not transferred against his personal representatives.

It will be remembered that rules 1 (e) and 2 of the English [cf. p. 221.] Order XI introduce important modifications of the general principle of that order with regard to Scotland and Ireland: there is no corresponding modification of the rules of Edictal Citation with regard to England.

The jurisdiction of the Sheriff's Court is unlimited, but no appeal is allowed under £25: above that sum an appeal lies to the Court of Session, which however has also an original jurisdiction. The procedure of the Sheriff's Court is regulated by the 'Sheriff's Court (Scotland) Act, 1876.'

Jurisdiction  
of Sheriff's  
Court.  
39 & 40 V.  
c. 70.

**39 & 40 Vic: c. 70, s. 8.**

All petitions may, except as hereinafter provided, proceed on seven days' warning or induciæ where the defender is within Scotland, unless in Orkney or Shetland, or in any other island within Scotland, and fourteen days when he is in Orkney or Shetland, or such other island, or is not within Scotland; and in all kinds of execution proceeding upon extracted decrees a seven days' charge shall, except as hereinafter provided, be competent and sufficient.

s. 8.  
Induciæ  
of petitions  
and periods  
of charge.

**s. 9.**

It shall be competent to execute edictally any warrant of citation granted or charge on an extracted decree pronounced by a sheriff against any person furth of Scotland, by delivery of a copy thereof at the office of the keeper of edictal citations at Edinburgh according to the mode established in regard to the execution edictally of citations and charges on warrants of the Court of Session; or by sending to such keeper in a registered post-letter a certified copy of such warrant or charge, of which copy the keeper shall acknowledge the receipt. Every citation or charge so executed edictally shall be recorded in the record of edictal citations or charges against persons furth of Scotland cited or charged upon warrants proceeding from any sheriff court therein.

s. 9.  
Sheriff's  
warrants,  
&c., may be  
executed  
edictally.

Where the party cited or charged has a known residence or place of business in England or Ireland, a copy of the petition and citation, or of the decree and charge, on fourteen days' induciæ, shall be posted in a registered letter to the party at such address by the officer, whose execution shall bear that he has done so. The sheriff clerk shall in all warrants to cite or charge persons furth of Scotland insert a warrant to cite or charge edictally.

Where  
party cited  
in England  
or Ireland.

**s. 12.**

(2) A party who appears shall not be permitted to state any objection to the regularity of the execution or service as against himself of the petition by which he is convened.

s. 12.  
Effect of  
appearance.

39 & 40 V.  
c. 70 s. 12.  
Service of  
schedule in  
arrestment.

Service at  
Market  
Cross  
abolished.

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(5) An arrestment shall be ineffectual, when the schedule of arrestment shall not have been personally served on the arrestee unless a copy of such schedule shall also be sent to the arrestee at his last known place of abode through the post by the officer serving the same, who shall certify in his execution that he has done so, stating the address to which the copy has been sent.

(6) Service at the market cross is hereby abolished.

[Note the 'Citation Amendment (Scotland) Act, 1882'—  
45 & 46 Vic: c. 77.]

## CHAPTER IX.

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## JUDGMENTS IN REM.

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WE have hitherto confined our attention solely to judgments *in personam*; we now proceed to consider judgments *in rem*.

Definition of judgments *in rem* by Cockburn, C.J.

These were defined by Cockburn, C.J., in *Castrique v. Imrie*, to be judgments determining the *status* of a chattel with reference to property, or vesting the 'property at once in the claimant, as a 'condemnation of the Court of Exchequer in a revenue cause 'vests the property in the Crown, or a sentence of a Court of 'Admiralty in a matter of prize vests the property in the captors.'

*Castrique v. Imrie.*  
30 L. J.  
C. P. 177.

Must be carefully considered.

*Status.*

As applied to things.

Judgments as to possession of things.

Judgments as to property in things.

Consequence of such judgments.

This definition, when thoroughly understood, is perhaps the most accurate that can be given, but it requires considerable attention in order to obtain a clear insight into its meaning. The word *status* in its ordinary use is applied to the condition of a person; a judgment on a question of status is a decree recognising such condition, and establishing such status: thus, that a child is or is not legitimate. The application of the word *status* to things involves us in not a little ambiguity; for the determination of a dispute with regard to the right to things is more usually in this form, 'as between these parties, A has the right to the thing': and this decision bears no analogy whatever to a judgment of personal status, and yet it is a judgment dealing with the chattel 'with reference to property.' There is however another kind of judgment with regard to things which is exactly analogous to a judgment of personal status: such judgments as 'the goods are prize,' 'the goods are contraband.' Of these it may appropriately be said that they determine the status of the chattel. In the same way as a child once declared illegitimate *is* illegitimate, so a chattel once declared contraband *is* contraband. But the judgment does more than determine the status of the thing, it determines that status with reference to property: for there is an immediate consequence, the property in the goods, and not merely the possession of them, is changed.

It is perhaps more strictly accurate to say that it is divested out of the defendant rather than that it is vested in the claimant, because with regard to contraband, destruction of the goods may follow. There are two examples taken in the definition to explain what is meant by the vesting or divesting of property consequent upon a judgment determining the status of a chattel. It is at once evident that the definition does not include the simple judgment declaring A to have the right to the possession of the property, because there is no declaration that the property *is* A's.

We must now consider the meaning of the term *in rem*.

Different meanings of *in rem* considered. *Jus in rem*.

When applied to *jus* it denotes the compass and not the subject of the right. It denotes that the right in question avails against persons generally, and *not* that the right in question is a right over



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a thing. Accordingly some rights *in rem* are rights over things, others are rights over persons [Austin, pp: 380, 814].

So when applied to a judgment, the term *in rem* denotes the judgment compass and not the subject of the judgment; it denotes that it is conclusive against persons generally, and not against one or more determinate persons [Austin, p. 990]. But this last is exactly what the simple judgment declaring A to have the right to possession does; and therefore it is not a judgment *in rem*. But in the Prize and Exchequer cases the divesting and vesting is absolute, the title in the Crown or captors to transfer or destroy is complete, and conclusive against all persons generally; those judgments therefore are properly called judgments *in rem*.

But the term *in rem* is applied also to actions. Austin points out [p. 969] that its application here is elliptical and leads to confusion and obscurity, unless as in the Roman Law a sentence based on property is the result: more generally 'by action *in rem*, is 'meant an action of which the *ground* is an offence against a right 'in rem, and of which the *intention* (scope, or purpose) is the restitution of the injured party to the exercise of the violated right.' But this offence against the right *in rem* is by a certain person, and the restitution is sought against that person by means of an action *in personam*. In these so-called actions *in rem* therefore, a declaration of the right *in rem*, that is, a judgment *in rem* is not required; but the cause of action is *in personam*, and the judgment is *in personam* against the offender, ordering him and no one else to restore the plaintiff to the enjoyment of his right.

The old real action in English law did no more than this: for example the form of a judgment for the demandant in a writ of right was, 'that he recover his seisin against the tenant of the 'tenements, with the appurtenances, to hold to him and his heirs, 'quit of the tenant and his heirs for ever.' The judgment therefore being only a bar when the second action was of the same nature, and between the same parties. [Roscoe on Real Actions, pp: 5, 329.] The same may be said of the old possessory action, and the modern action for the recovery of land: the judgment in each case being merely a judgment *in personam*, binding only between the parties.

The Roman *actio in rem*, which was brought for the vindication of the right both to moveables and immoveables, was not only based on a *jus in rem* as equivalent to *dominium* or property, but led to a sentence which did in fact declare that property to exist; and which was therefore a judgment *in rem*.

Admiralty  
action *in*  
*rem*.

Its origin.

Consequence  
of judgment.Not on the  
status of the  
thing ; but  
conclusive  
against all  
the world.Cockburn,  
C.J.

We come now to Admiralty actions *in rem*. The term has here ceased to mean either, as in *jus in rem*, an universal right ; or as in action *in rem*, the vindication of an universal right ; but denotes that the action is brought, in so many words, against the *res*. For the further security of a right against the owners a maritime lien is given, now by Common Law, now by Statute, on the ship ; and to enforce that lien an action is allowed to be brought against the ship itself, the owners and all parties interested being also made defendants to the suit. As Dr. Lushington explained in the case of *the Lanarkshire*, it is an alternative remedy given, as for example, in the case of wages, for the further protection of seamen. This action is therefore brought to enforce not a *jus in rem*, but a *jus in personam*. If the wages are not paid the Court decrees a sale of the vessel, the surplus of course going to the owners. The property in the ship is divested absolutely from the owners ; it is also vested in the purchaser by virtue of the sale under the judgment, and therefore, so far as the title of the purchaser is concerned, it resembles the judgment *in rem* in the strict sense ; but this change of property is not the *immediate* consequence of the judgment ; if the analogy were complete the property in the ship should vest in the sailors who claim their wages. But it is called a judgment *in rem* for the same reason that the action is called *in rem*, because it is against the *res*. We have not therefore in this case a determination on the status of the chattel with reference to property, but yet we have a judgment conclusive against all the world. This may possibly be arrived at by means of the artificial citation to all parties interested : all persons interested being thus made parties to the suit, all are bound by the judgment : in this circuitous way we have a judgment which in the true sense of the words is a judgment *in rem*. ‘The whole world it is said are ‘parties in an Admiralty cause, and therefore the whole world is ‘bound by the decision’ (Marshall, C.J., *the Mary* [New York]). This difficulty was discussed by Cockburn, C.J., in *Castrique v. Imrie*, from whose judgment we have drawn the definition given at the commencement of this chapter : after pointing out that the judgment of the French court, although it simply decreed the sale of a particular chattel to satisfy a money demand and therefore hardly fell within the strict definition of a judgment *in rem*, yet was strictly analogous to the sentences of a Court of Admiralty on a claim of salvage ; he thus concluded : ‘Now the sentences of ‘the Court of Admiralty in the matter of maritime liens have ‘always been considered as judgments *in rem*. And in one sense

*the Lanark-*  
*shire*.  
2 Spinks 189.*the Mary*.  
9 Cranch  
126.  
*Castrique*  
*v. Imrie*.  
30 L. J.  
C. P. 177.

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‘they properly are so ; for the purpose of the suit, and the effect of the judgment, are to afford a remedy, not by execution against the person or general estate of the defendant, but by appropriation of a specific chattel to satisfy the plaintiff’s claim.’ The result seems to be therefore that these Admiralty judgments differ from the true judgments *in rem* in that they do not immediately vest the property in the claimant, but hypothecate it to his claim : and that for the same reason they differ from judgments *in personam*, because this is not a remedy by execution against the person or general estate of the defendant. This distinction was much emphasised in *Simpson v. Fogo* : a ship had been seized under an attachment of the Court of Louisiana, and sold under a process similar to a *fi. fa.*, at the suit of a foreign creditor of the mortgagor : the mortgagee intervened and his claim was disallowed : he claimed a second time on the occasion of the purchaser sending the ship to England. Vice-Chancellor Wood dwelt on the fact that there was no judgment *in rem* : the ship had been seized as part of the general property of the debtor : the Court of Louisiana only affected to deal, so far as it directed a sale of the ship, with such title as the debtor had. So too in the *Liverpool Marine Credit Co. v. Hunter* the question did not relate to a judgment *in rem*, but to a transfer of chattels valid by the law of the place of transfer : and this was the ground of the decision of the Exchequer Chamber in *Cammell v. Sewell*.

How they differ from the true judgments *in rem*.  
And from judgments *in personam*.

*Simpson v. Fogo*,  
32 L. J.  
Ch: 249

*Liverpool Co. v. Hunter*,  
L. R. 3  
Ch: 479.

*Cammell v. Sewell*,  
27 L. J.  
Ex: 447.  
*Castrique v. Imrie*,  
L. R. 4  
H. L. 427.

See also Mr Justice Blackburn’s remarks in *Castrique v. Imrie* in the House of Lords.

Now, from a judgment *in rem* there results to the successful claimant a *jus in rem* ; that is, the property is vested in him as against everybody else, or, using the more common expression, as against all the world ; which evidently must be taken to mean, as against all the world subject to the English courts, or to become subject to them by a violation of the right within the jurisdiction of the English courts. (This is of larger application than Mr Markby’s definition, ‘against all persons, members of the same political society as the person to whom the right belongs.’) In other words, the court, having considered the merits of the case, has vested the property in a certain person ; and the right to this property, all other courts under the same Sovereign Authority, will protect should it be called in question by any one.

*Jus in rem* resulting from judgment *in rem*.

Markby’s definition.

Now, from a judgment *in personam* there results only a *jus in personam* : This right also is in a certain person, but it is in him only as against one particular and definite person (or particular

Differences between *jus in rem* and *jus in personam*,

resulting  
from  
judgments.  
*Jus in  
personam.*

When the  
right is  
considered as  
established.

*Jus in rem.*

The duty  
correlative.

When the  
right is con-  
sidered as  
established.

Foreign  
judgment  
*in rem.*

Recapitula-  
tion: con-  
clusion as to  
judgment *in  
personam.*  
[cf. p. 18.]

Parallel  
conclusion as  
to judgment  
*in rem.*

and definite persons, or their representatives): To this *jus in personam*, there is a correlative obligation: The sanction attaching to the obligation is resident in the Sovereign Authority of the State: But it is only when the subject of this obligation—a party to the original action—attempts to call this right in question, that the courts will consider the right as established by the first adjudication, and will not re-open the merits of the case.

But to the *jus in rem* resulting from a judgment *in rem* there is also a duty correlative—the duty is negative—to abstain from violating the right declared to exist. Obedience to this duty is incumbent upon everybody; and this, as we have seen, from the very nature of the right, for the decision of the court is that the right to the thing is in a certain person only, and in no one else. No definite name, as opposed to ‘obligation’ has been given to this correlative duty, but as before, the sanction attaching to it is resident in the Sovereign Authority of the State.

We arrive then at a result similar to that arrived at in the case of judgments *in personam*:—When any one, a subject of this duty, attempts to call this right in question, the courts will consider the right as established by the first adjudication, and will not re-open the merits of the case.

The judgment *in personam* is so to speak a special case of the judgment *in rem*.

So far we have considered the English recognition of a judgment *in rem* pronounced by an English court: we will proceed to the case of a judgment *in rem* pronounced by a foreign court.

The conclusion arrived at in the first chapter was, that in addition to the obligation and sanction resident in the Sovereign Authority which arose upon a judgment *in personam*, there also came into being in every other state a bare obligation—resembling somewhat the *nudum pactum* of the Roman Law—which, when the subject of the obligation enters any foreign State, the Sovereign Authority of that State clothes with an auxiliary sanction, enforceable at the instance and discretion of the foreign judgment creditor: This sanction being founded upon the principles of International Comity.

So, in addition to the negative duty and sanction resident in the Sovereign Authority which arise upon a judgment *in rem*—obedience to which is obligatory upon all the world subject, or to become subject to that Sovereign Authority—there also comes into being in every other state, a bare negative obligation; which, when the person possessing the right *in rem* enters any foreign

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State, the Sovereign Authority of that State will, at his instance and discretion, clothe with an auxiliary sanction, when any subject of the duty (a subject of the foreign State) disobeys that duty by violating the right: This sanction being founded upon the principles of International Comity: For, when that subject comes within the State whose courts have created the right, the bare negative obligation would instantly become the absolute negative duty, and would be enforced by its correlative sanction resident in the Sovereign Authority.

The difference therefore between the two classes of judgments is simply this, that whereas third parties are entitled to have a judgment *in personam* entirely disregarded as against themselves, they are bound by a judgment *in rem*.

Main difference between judgments *in rem* and *in personam*.

We have already considered who are third parties, in discussing the question of *res judicata* [cf: p. 47].

With regard to the defences that may be raised to a judgment *in rem*, although we shall have to consider some of them at length, it will be advisable to establish at once the main principle.

Defences.

*Castrique v. Imrie*.  
30 L. J.  
C. P. 177.

There are to be found traces in judgments, notably those delivered in *Castrique v. Imrie*, of an opinion that a judgment *in rem* is entitled to greater respect than a judgment *in personam*; or putting it the other way, that a judgment *in personam* is entitled to less respect than a judgment *in rem*: in other words, that defences as to which some doubt exists as to whether they could be raised to a judgment *in personam*, certainly could not be raised to a judgment *in rem*. We venture to think this opinion fallacious: for the only difference between the two judgments being one of extent, it follows at once that the same rules of defence must apply in the one case as in the other.

Old opinions that the rule as to judgments *in personam* does not apply. [cf: p. 114.]

Having thus clearly before us what are judgments *in personam*, and what are judgments *in rem*, we proceed to consider the effect of foreign judgments *in rem*.

The same rule should apply.

Effect of foreign judgments *in rem*.

First, as to judgments in matters other than prize and condemnation.

We are met at the very outset with a confusion resulting from the varying use of the term *in rem*. Story says, 'And first in relation to judgments *in rem*, If the matter in controversy is land, or other immoveable property, the judgment pronounced in the forum *rei sitæ* is held to be of universal obligation, as to all matters of right and title which it professes to decide in relation thereto. This results from the very nature of the case; for no other court can have a competent jurisdiction to enquire into

referring to land or immoveables. Story. § 591.



'or settle such right or title. By the general consent of nations, 'therefore, in the case of immoveables, the judgment of the forum '*rei sitæ* is held absolutely conclusive, and on the other hand, a 'judgment in 'any foreign country, touching such immoveables, 'will be held of no obligation.' [Conflict of Laws, § 591.]

Fallacy in  
Story's  
statement.

The fallacy in this statement lies in the use of the words 'universal obligation : ' the meaning intended to be conveyed is that such a judgment is entitled to 'universal recognition ; ' but this must evidently mean as between the parties to the original suit, and therefore it is a mistake to assume that these judgments are necessarily judgments *in rem* ; the reason of this universal recognition has already been fully discussed under the head of 'territorial jurisdiction : ' [cf: p. 139]. As we have just seen the old English real actions were not judgments *in rem*, that is, were not binding on persons not parties to the suit ; and therefore in the absence of proof, there is no ground for supposing that a judgment of a similar nature given abroad is a judgment binding on persons other than those who are parties to the suit. But the sentence in the Roman *actio in rem* was, as we have said, declaratory of property, and was therefore a judgment *in rem*, binding on all persons. Therefore in countries whose laws are based upon the Roman Law there is a strong presumption that such a judgment relating to immoveables is in fact a judgment *in rem*. Further, the *actio in rem* being also the proper remedy for the recovery of moveables, the same remark may be made with regard to a foreign judgment relating to such property. In all cases therefore, it is a matter to be enquired into whether, in the country where it was pronounced, the judgment in question is a judgment *in rem* : if it is, it will be recognised as such in this country, and be held binding on all persons whether parties to the original suit or not. This point has been noticed shortly in Smith's Leading Cases [vol. ii. 8th ed: p. 871] : but the two cases there cited in support of the proposition do not in reality bear upon the question.

Two recent  
decisions  
examined.

There are two very important recent cases in which this enquiry, whether the foreign judgment was *in rem* or *in personam*, was involved, and in the solution of it no less than twenty Judges were engaged at different times ; in both cases the Court of Error differed from the conclusion arrived at by the court below.

In *Cammell v. Sewell*, the judgment had been delivered by the Superior Court of Drontheim, confirming an act of survey and public auction of a ship and cargo of deals which had got on

*Cammell v.*  
*Sewell.*  
27 L. J:  
Ex: 447.  
[on app:]  
20 L. J:  
Ex: 350.

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shore on the coast of Norway: The act of survey and public auction are judicial proceedings, from which, by the law of Norway, appeals will lie: and such sale by the master transfers the property in the cargo. The sale however was unnecessary, and the agent of the underwriters had protested.

In the Exchequer, the judgment was held to be in the nature of a judgment *in rem*, and therefore binding on the underwriters who had brought an action to recover the value of the deals from the purchasers; the court thought that there had been an adjudication upon the status of the property, and that it was similar to an Exchequer condemnation. Exchequer.

The decision was affirmed in the Exchequer Chamber but on a different ground. Crompton, J., said that the Court was by no means prepared to agree in thinking that the Norwegian judgment was *in rem*: but that the underwriters nevertheless could not recover in virtue of the simple proposition that 'if personal chattels are sold in a manner binding according to the law of the country in which they are disposed of, that disposition is binding everywhere.' Exchequer  
chamber.

*Castrique v.  
Imrie.*  
30 L. J:  
C. P. 177.  
[on app:]  
L. R. 4 H. L.  
414.

In *Castrique v. Imrie*, proceedings on a dishonoured bill, drawn by the master upon his owner in England for necessities, were taken in the Tribunal de Commerce at Havre, against the master and against the ship. The Court condemned the master 'en sa qualité de Capitaine, et par privilège sur le navire,' to pay the amount of the bill; and declared him free from arrest, to which he would otherwise have been liable.

Before the Tribunal de Commerce the master only was summoned: but before this decision was reviewed by the Civil Tribunal of the district, all the persons who appeared upon the ship's papers to be owners of the ship were summoned: but the mortgagees were not summoned and were in fact absent: the judgment was affirmed, and the ship was ordered to be sold by public auction.

The plaintiff, the last mortgagee of the ship, brought a suit 'in the nature of a suit to replevy the ship,' in the Civil Tribunal of Havre to release the ship. The original seizure was upheld, and the plaintiff condemned in costs, because the Court (misconceiving the English law) thought that by that law, no valid transfer could be made of a ship, to the prejudice of creditors, whilst she was on a voyage, unless some trace of the sale appeared on the ship's papers. French  
courts.

Finally, the superior Tribunal of Rouen upheld the decision of the court below.

English  
courts.

The Court of Common Pleas held the judgment to be *in personam* :

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The Court of Exchequer Chamber held it, as we have seen, to be strictly analogous to the sentence of the English Court of Admiralty in a claim of salvage, and therefore *in rem* [*cf.* p. 246] : this decision was affirmed by the House of Lords.

The same difficult question arose in *the City of Mecca* : owing to an error in an affidavit, Sir R. Phillimore had assumed that a judgment delivered by the Portuguese court, and which the English court was asked to enforce, was a judgment *in rem* : it transpired afterwards that modern Portuguese law does not adopt the distinction between actions *in personam* and actions *in rem*, and for this reason the Court of Appeal reversed the judgment of the court below. Now, although the action may certainly have had for one of its objects the seizure of the vessel, yet it could only effect this by a judgment *in personam* against the captain and owners, and when the damage was ascertained execution would issue against it as well as against any other property belonging to them : there was therefore no hypothecation of the property and therefore no resemblance to an Admiralty judgment, certainly none to a true judgment *in rem*. An important principle was however enunciated by Sir R. Phillimore which it will be convenient to notice here. A foreign judgment *in rem* hypothecating the vessel to satisfy a lien upon it, may be enforced in this country by a proceeding in the Admiralty Court against the ship when it comes within the jurisdiction and it can be seized. But, bearing in mind the alternative nature of the remedy, it would seem that there may also be an action *in personam* against the owners to enforce the foreign judgment if it is not purely one of hypothecation, but is also against them personally.

Seizure of  
vessel by  
judgment *in  
personam*.

Foreign  
judgment  
hypothecat-  
ing ship  
enforced in  
Admiralty  
Court.

*the City of  
Mecca.*  
5 P. D. 28.  
[on app.]  
6 P. D. 106.

*The effect of a judgment in rem as between the owner and the purchaser.*

Effect of  
judgment  
as between  
owner and  
purchaser.

As we have seen, in Prize and Exchequer cases, the consequence of the judgment is a divesting of the property out of the original owner, and a vesting of it in the claimant : the claimant therefore has a right to sell and a power of conferring a good title on the purchaser : and in Admiralty judgments if the ship is sold, the court gives the purchaser a good title. With regard to English decisions the owner may seek such redress as the laws regulating appeals may give him ; and, bearing in mind what has been said as to judgments *in personam*, with regard to foreign decisions

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*Hughes v.  
Cornelius.*  
2 Shower  
232.

*the Flad  
Oyen.*  
8 T. R. 270n.

*the Segredo.*  
1 Spinks 36.

(subject to what will be said hereafter on foreign condemnations), the owner may avail himself of the appeal courts in the foreign country; beyond this however, in the words of the marginal note to the leading case of *Hughes v. Cornelius*: (the case 'being of 'an English ship taken by the French and as a Dutch ship, in 'time of war between the Dutch and French'); 'The sentence 'in a foreign Court of Admiralty decreeing a ship to be lawful 'prize, is conclusive: and therefore, though erroneous, the owner 'cannot recover the ship back by trover against the vendee.' It was '*per curiam* agreed and adjudged, that as we are to take 'notice of a sentence in the Admiralty here, so ought we of those 'abroad in other nations, and we must not set them at large 'again: for otherwise the merchants would be in a pleasant 'condition.' Sir William Scott makes this point very clear in the case of *the Flad Oyen*:—'The law of England and the 'general practice of the law of nations requires a sentence of 'condemnation as necessary to transfer the property: and a 'neutral purchaser in Europe during war, does look to the legal 'sentence of condemnation as one of the title-deeds of the ship, 'if he buy a prize vessel. It is amongst those documents which 'are most universally produced by a neutral purchaser, that if 'she has been taken as a prize it should appear that that prize 'has been in the proper judicial form subjected to adjudication.'

Sentence of  
condemna-  
tion a title-  
deed.

See Dr. Lushington's remarks in *the Segredo*.

But the owner if insured may endeavour to recover on his policy against the underwriters: we must therefore now consider

*The effect of a judgment in rem as between the owner and the underwriters.*

In time of war, foreign Admiralty decisions in matters of prize very frequently come before the English courts. Nearly all the cases cited will be found to have arisen in the early part of this century, during the wars between England and France. The condemnations of the foreign Prize Courts were usually made use of in actions between the assured and the underwriters; the owner of the captured vessel claiming the amount of his insurance: the underwriters alleging a violation of the warrant of neutrality in the policy, and producing the foreign condemnation as proof.

Effect of  
judgment  
as between  
owner and  
underwriter.

*Baring v.  
Clagett.*  
3 B. & P.  
201.

'These sentences are admissible and conclusive between the 'assured and the underwriters with respect to every fact which 'they profess to decide.' (Lord Alvanley, C.J., *Baring v. Clagett*.)

Question  
between  
assured and  
under-  
writers.

The question between the assured and the underwriters is: Has the warrant of neutrality been violated? Was the ship at the time of her capture doing such things as a neutral vessel might do? The underwriters produce the condemnation of the foreign Prize Court: if therefore this sentence says absolutely, that the vessel was not neutral; that is, that it was enemy's property; or that she was doing such things as would render her liable to be treated as enemy's property, it will be received as answering the question in favour of the underwriters.

The right of the underwriters to produce the sentence was questioned in *Lothian v. Henderson*: but the majority of the Judges held that they were clearly entitled to do so.

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*Lothian v.  
Henderson.*  
3 B. & P.

In *Marshall v. Parker*, Lord Ellenborough, C.J., held that it was necessary to lay a foundation for the sentence, by proving that the vessel was captured: till that had been done, the sentence was merely *in vacuo*:—And in *Von Tungeln v. Dubois* the same learned Judge decided that a ship being merely *represented* neutral, there was no *warrant* of neutrality; and that therefore a condemnation for a violation of the laws of neutrality, was not evidence to falsify the representation—if the ship was in reality documented and navigated according to the laws of the state to which she belonged.

<sup>409.</sup>  
*Marshall v.  
Parker.*  
2 Camp: 69.

*Von  
Tungeln  
v. Dubois.*  
2 Camp: 151.

Difference  
between  
representa-  
tion and  
warrant of  
neutrality.

A representation is made before the subscription of the policy, and is never in terms, inserted in it: whereas a warranty, not implied by law, is in every case asserted on the face of the policy [*cf.* Arnold's Marine Insurance, pp: 476, *et seq.*].

The first conclusion at which we arrive is evidently this;

'Enemy's  
property.'

*If the ground of condemnation be clearly set forth to be that the ship is enemy's property*, it will be held conclusive to negative the warrant of neutrality.

Cases.

*Bernardi v. Motteux*.<sup>1</sup> Lord Mansfield, C.J.

*Calvert v. Bovill*.<sup>2</sup> Lawrence, J.

*Geyer v. Aguilar*.<sup>3</sup> Lord Kenyon, C.J.

*Christie v. Secretan*.<sup>4</sup> „

*Pollard v. Bell*.<sup>5</sup> „

*Kindersley v. Chase*.<sup>6</sup> Sir W. Grant, M.R.

*Baring v. Clagett*.<sup>7</sup> Lord Alvanley, C.J.

*Lothian v. Henderson*.<sup>8</sup> Le Blanc, J.

Chambre, J.

<sup>1</sup> 2 Dougl:  
575.  
<sup>2</sup> 7 T. R.  
523.  
<sup>3</sup> 7 T. R.  
681.  
<sup>4</sup> 8 T. R.  
192.  
<sup>5</sup> 8 T. R.  
434.  
<sup>6</sup> Park on  
Insurance,  
8th ed.: 743.  
<sup>7</sup> 3 B. & P.  
201.  
<sup>8</sup> 3 B. & P.  
499.

Other  
grounds.

but if 'enemy's property' is not assigned as the reason, and other grounds are set out (not coming under this and the following heads), as in *Calvert v. Bovill*, the sentence will not be received.

*Calvert v.  
Bovill.*  
7 T. R. 523.



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The next consideration is, where the ground of enemy's property is not clearly set forth: nothing appearing but the mere condemnation. 'Enemy's property' not stated.

There is a conflict of authority as to the conclusiveness of the sentence. Authorities in favour of inference being made.

*Lothian v. Henderson.*  
3 B. & P.  
499.

In *Lothian v. Henderson*, Lord Eldon, C., said:—'The question would be whether such sentence of condemnation must not be presumed to have been founded on the only legitimate ground on which they can be founded, namely, the property not being neutral but hostile.' And in *Pollard v. Bell*, Le Blanc, J., said:—

*Pollard v. Bell.*  
8 T. R. 434.

'If there be a general sentence of condemnation, without assigning any reason, the courts here will consider that it proceeded on the ground of the ship's being the property of an enemy.' In *Bernardi v. Motteux*, Lord Mansfield, C.J., appears to have doubted whether the inference should be made: he remarked that the 'inconvenience would be entirely obviated if the foreign courts would say in their sentences,—condemned as 'enemy's property'; but in a later case, *Saloucci v. Woodmas*, he held that the ship being condemned as 'good and lawful prize,' it must have proceeded on the ground of the property belonging to an enemy.

*Bernardi v. Motteux.*  
2 Dougl.  
575.

*Saloucci v. Woodmas.*  
Park on Insurance,  
8th ed: 727.

*Dalglish v. Hodson.*  
7 Bing: 495.  
*Fisher v. Ogle.*  
1 Camp:  
418.

Tindal, C.J., in *Dalglish v. Hodson*, and Lord Ellenborough, C.J., in *Fisher v. Ogle*, are entirely against this inference being made, the refusal to recognise the condemnations being based on the principle that a judgment is only conclusive as to facts on which it expressly proceeds; the Chief Justices holding that these facts must appear in the sentence free from doubt and ambiguity. The same doctrine was laid down in *Robinson v. Jones* [Massachusetts].

Authorities against the inference being made.

*Robinson v. Jones.*  
8 Mass:  
Rep: 536.

But the law of nations recognises other grounds than 'enemy's property' as justifying a sentence of condemnation as prize; and where these are set forth, it will as before be held conclusive.

Of these the first to be noticed is,

## BREACH OF BLOCKADE.

'It is an invariable principle of the law of nations that if a neutral violates a blockade by carrying supplies to, or in any way trading with, a blockaded port, he is guilty of an offence against the laws of war, and thereby renders his ship and cargo liable to confiscation.' [Arnold's Marine Insurance, p. 650.] It follows therefore that a foreign sentence condemning a vessel as prize on this ground will be held conclusive in favour of the underwriters.

Breach of blockade.

*Dalglish v. Hodson.*  
7 Bing: 495.

This was admitted in *Dalglish v. Hodson*, the sentence in that case being rejected because the breach was not expressly stated,

but declared that on account of certain circumstances the vessel 'ought to be considered as violating the blockade.' The same principle was laid down in *Radcliffe v. United Insurance Co.*: [New York], and *Baxter v. New England Insurance Co.*: [Massachusetts], where it was held that the sentence was conclusive both of the fact that the port was blockaded and of the breach of it.

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*Radcliffe v. United Ins: Co.*  
9 Johnson 277.  
*Baxter v. New England Ins: Co.*  
6 Mass: Rep: 277.

### CONTRABAND OF WAR.

Contraband of war.

Contraband of war was recognised as a good ground of condemnation in *Hobbs v. Henning*; the sentence in that case was however rejected because consistently with it the vessel might have been sailing to a neutral port.

*Hobbs v. Henning.*  
34 L. J: C. P. 117.

### VIOLATION OF TREATIES.

Violation of Treaties.

Two countries being at war, the violation of a treaty between one of the belligerents and a neutral state by a vessel belonging to the latter, will justify its condemnation as prize by a Prize Court of the belligerent state. 'If the French court had condemned 'the ship and cargo for having violated any treaty which subsisted 'between France and America, we should not have been able to 'extricate ourselves from the effect of such a sentence.' (Lord Kenyon, C.J., *Christie v. Secretan*.)

*Christie v. Secretan.*  
8 T. R. 192.

A very common ground of condemnation appears to have been VIOLATION OF ORDINANCES of the foreign country.

Violation of ordinances.

English Judges have been almost unanimous in rejecting such condemnations, and refusing to receive them as falsifying a warranty of neutrality. The reason for this refusal being that these ordinances are not part of the Law of Nations; are not of universal acceptance amongst other nations; and that therefore other nations are not bound to recognise them: although 'third persons 'and mercantile people are bound to take notice of them for their 'own safety.' (Lord Mansfield, C.J., *Barzillay v. Lewis*.<sup>2</sup>)

*Mayne v. Walter*.<sup>1</sup> Lord Mansfield, C.J.

*Barzillay v. Lewis*.<sup>2</sup> „

*Geyer v. Aguilar*.<sup>3</sup> Lord Kenyon, C.J.

*Pollard v. Bell*.<sup>4</sup> „

*Bird v. Appleton*.<sup>5</sup> „

*Price v. Bell*.<sup>6</sup> „

*Baring v. Claggett*.<sup>7</sup> Lord Alvanley, C.J.

*Dalgleish v. Hodson*.<sup>8</sup> Tindal, C.J.

It is evident that the breach of the warrant of neutrality cannot

<sup>1</sup> Park on Insurance, 8th ed: 431-730.  
<sup>2</sup> *ib.*: 725.  
<sup>3</sup> 7 T. R. 681.  
<sup>4</sup> 8 T. R. 434.  
<sup>5</sup> 8 T. R. 562.  
<sup>6</sup> 1 East, 663.  
<sup>7</sup> 3 B. & P. 201.  
<sup>8</sup> 7 Bing: 495.

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possibly be proved by a sentence of condemnation proceeding on the ground of non-compliance with certain peculiar ordinances of a foreign country: the sentence for this purpose is therefore rejected. (Lawrence, J., *Pollard v. Bell*.)

*Pollard v. Bell*,  
8 T. R. 434.

For example, the French ordinance on which the condemnation in *Bird v. Appleton* proceeded, required that the lists of crew and despatches should be regular. That is neither required by the Law of Nations, nor was it by treaty between the two powers—France and the United States.

*Bird v. Appleton*,  
8 T. R. 562.

But these conditions may be again varied:—

*By the aid of these foreign ordinances, the court may have arrived at the conclusion that the ship was ENEMY'S PROPERTY.* The English courts have held themselves bound by such sentences because the fact was found that the ship was enemy's property; and they do not regard the means by which this conclusion was arrived at.

Condemned as 'enemy's property' by the aid of ordinances.

'All these ordinances meant was to lay down rules of decision 'conformable to what lawyers and statesmen of the country understood to be the just principles of maritime law, and to apprise 'neutrals what their rules are. The Court of Admiralty in France 'has not taken them as positive laws binding on neutrals, but they 'refer to them as establishing legitimate presumptions, from which 'they are warranted to draw the conclusion that is necessary for 'them to arrive at, before they are entitled to condemn.' (Sir W. Grant, M.R., *Kindersley v. Chase*.) And again:—'Looking at 'the whole of the sentence, it is impossible not to see that the 'French court canvassed and decided on the probability of the 'ship's actually being, or the fitness of its being presumptively 'deemed enemy's property: or at least not neutral, in respect of 'certain established indicia on that head, collected together in the 'ordinances it refers to.' (Lord Ellenborough, C.J., *Bolton v. Gladstone*.) And in the same case on appeal, Lord Mansfield, C.J., said:—'If the court comes to the conclusion that the vessel 'is not neutral, it is quite immaterial through what media it 'arrived at it.' So also, Erle, C.J., in *Hobbs v. Henning*:—'We 'have no jurisdiction to inquire into the validity of the legal 'grounds of the judgment.'

The object of ordinances.

*Kindersley v. Chase*,  
Park on Insurance,  
8th ed: 743.

*Bolton v. Gladstone*,  
5 East 155.  
[on app.]  
2 Taunt: 85.

*Hobbs v. Henning*,  
34 L. J.  
C. P. 117.

*Baring v. Royal Ass: Co*:  
5 East 99.

The decision in *Baring v. Royal Exchange Assurance Co*: proceeds on the same ground: the condemnation was for infraction of a treaty requiring ships to be properly documented: but the inferences in the sentence were drawn from *ex parte* ordinances in aid of the conclusion of such infraction of treaty. Lord

'Infraction of treaty' by the aid of ordinances.

Ellenborough, C.J., held that the court was bound to give credit to the sentence, although the foreign court had 'construed the 'treaty iniquitously.'

It may be remarked that in nearly every case which we have quoted the court, while recognising the sentence, has expressed a conviction that the decision was wrong and unjust.

Briefly, the conclusions at which we have arrived are these :—

Conclusions.

- i. The foreign condemnation is conclusive, when it declares the vessel prize, as being enemy's property, for breach of blockade, and for violation of treaties ; irrespective of the ground on which the court proceeded.
- ii. It is doubtful whether it is conclusive, when it declares simply that the ship belongs to the captors as prize.
- iii. It is not conclusive, when it declares that the ship belongs to the captors as prize, by reason of a violation of ordinances binding solely in the foreign country.

Conclusions  
reviewed.

But these conclusions are drawn from cases between underwriters and the owners suing for the assurance on account of the loss of the vessel by capture, in which the foreign sentence has been made use of merely for the purpose of deciding the question of the violation of neutrality : if therefore the doubt contained in the second paragraph should ever be decided against the conclusiveness of the condemnation, it will not in any way interfere with the theory of the conclusiveness of foreign judgments generally. Not being absolute in favour of the underwriters, it is absolute in favour of the assured : the only difficulty lying in the solution of the question, does the judgment negative the warrant of neutrality ? If the answer is in the affirmative, the condemnation is absolute for the underwriter ; if in the negative, it is absolute against him.

Illustration  
of con-  
clusiveness  
of judgment.

Finally, we must quote the case of *Duckworth v. Tucker* as illustrative of the conclusiveness of a judgment *in rem* against all the world. The action was brought by an officer in the service of one of our allies to recover a share in the prize money resulting from the sale of a captured vessel. It was held that the condemnation as prize was conclusive on the Common Law Courts that no others were entitled to a share than those to whom it had been awarded by the sentence.

*Duckworth*  
*v. Tucker.*  
2 Taunt: 7.

#### DEFENCES TO A JUDGMENT *in Rem*.

Defences.

We have already pointed out that the main principles of defence to judgments *in rem* must coincide with those which may be raised

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to judgments *in personam*. A great part therefore of the chapter on defences may be taken as applicable to judgments *in rem*. Two of the defences however, 'against International Law' and 'Absence of Jurisdiction,' again come into prominence in connexion with these judgments.

*Against International Law.*

The conclusion at which we arrived with regard to this defence, it will be remembered, was that when it is possible to establish conclusively that the law alleged to be violated is without doubt part of the law of nations, then the defence is a good one : with regard to judgments *in personam* the questions that arise fall within what is generally understood to be private international law : the same remark applies to judgments *in rem* other than those of prize courts : but the decisions of prize courts proceed on public international law, the doctrines of which are more capable of being ascertained and more universally understood than those of the private law. It was very broadly laid down in *Bradstreet v. Neptune Insurance Co.*: [New York] that the decisions of prize courts acting *in rem*, being based on these doctrines, are subject to revision at the hands of the courts of other nations when there has been a violation of these doctrines.

Breach of  
International  
Law.  
[cf. p. 174.]

Subject to  
revision  
on this  
ground.

Thus in reviewing the foregoing decisions of the English courts in matters of prize, we find first, a submission to these principles in the recognition of sentences based on 'Enemy's Property' 'Breach of Blockade,' 'Contraband of War,' and 'Violation of Treaties;' the law of nations recognising these as good grounds of condemnation : but we find also a rejection of the sentences where they have exceeded these recognised limits : for instance, where new general grounds were given, as in *Calvert v. Bovill*; and where the ground was a breach of an ordinance passed by the state whose court had condemned the vessel.

The defence setting up a violation of International Law is therefore clearly admissible : but such a violation will not be presumed : — 'It has been said that the assured ought not to be concluded 'by a foreign sentence because the Court of Admiralty must be 'supposed to be partial to the nation to which they belong and for 'whose benefit they decree condemnation. To this I answer that 'such partiality is not to be presumed by one court in the conduct 'of another' (Sedgwick, J., *Baxter v. New England Insurance Co.* : —Massachusetts). In like manner, it must be borne in mind that this refusal has never been actuated by warlike feelings on the

Breach of  
international  
law will  
not be  
presumed.

*Bradstreet  
v. Neptune  
Ins. Co.*  
3 Sumner  
300.

*Calvert v.  
Bovill.*  
7 T. R. 523.

*Baxter v.  
New  
England  
Ins. Co.*  
6 Mass.  
Rep. 277.



part of the English courts. (Ashhurst, J.—*Geyer v. Aguilar*.) And this is borne out by the fact that in those cases where the ordinances—although arbitrary and not in conformance with International Law—led the courts to the conclusion that the ship was enemy's property, or that a treaty had been violated, the decisions have been recognised. It is breach of international law by the court that is considered, rather than breach by the law itself on which the sentence has been based.

The remarkable words of Lord Ellenborough as to the general principle of receiving these condemnations must be here noticed :—‘I am by no means disposed to extend the comity which has ‘been shewn to these sentences of Foreign Admiralty Courts. I ‘shall die, like Lord Thurlow, in the belief that they ought never ‘to have been admitted. The doctrine in their favour rests on ‘*Hughes v. Cornelius*, which does not fully support it; and the ‘practice of receiving them often leads in its consequences to the ‘grossest injustice.’

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*Geyer v.  
Aguilar.*  
7 T. R. 681.

*Hughes v.  
Cornelius.*  
2 Shower  
232.

### *Absence of Jurisdiction.*

Absence of  
jurisdiction.

What has already been said on the subject of International Law prepares the way for a consideration of the question of the jurisdiction of Prize Courts. As there are clearly defined principles to guide these courts in proceeding to the condemnation of captured vessels and cargoes, so we find clearly established principles on the question of their jurisdiction : so that the defence raising ‘absence ‘of jurisdiction’ in the court is in reality another example of a violation of International Law. ‘This court will examine into ‘the jurisdiction of the foreign court, and if that court cannot ‘consistently with the law of nations exercise the jurisdiction which ‘it has assumed its sentence is to be disregarded. But of their ‘own jurisdiction so far as it depends upon municipal laws, the ‘courts of every country are the exclusive judges.’ (Marshall, C.J., *Rose v. Himely*—New York.)

A special  
instance of  
breach of  
international  
law.

The case of *the Huldah*, in 1801, was one of several cases of ships and cargoes carried into St. Domingo, and proceeded against in a Court of Admiralty which was held not to be vested with competent authority to proceed in prize causes against France and Holland, though there had been a prize warrant issued then against Spain. In consequence of that mistake, original proceedings were instituted in the High Court of Admiralty on the petition of the claimants, by a monition calling on the captors to proceed to adjudication. Sir William Scott held, that although

*Rose v.  
Himely.*  
4 Cranch  
241.  
*the  
Huldah.*  
3 Robt.  
A. R. 235.

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the court had apparently authority, and distribution had taken place ; yet, it not having authority, the proceedings were null and of no legal effect whatever.

On the main question some guiding principles have been laid down by Mr Justice Story.

Principles  
as to  
jurisdiction  
in prize  
matters.

The jurisdiction should be absolute : recapture would clearly take the vessel out of the jurisdiction, and the sentence pronounced after such recapture would be a nullity.

Prize Courts acting *in rem* sit under the laws of nations, and therefore the courts of other nations are competent to enquire into an excess of jurisdiction. But Municipal Courts acting *in rem* must be presumed to act under and in accordance with their own laws : but still the *res* must be in possession positively or constructively.

Physical force actually applied is not indispensable to the creation of jurisdiction : for instance, embargo, where there is a moral restraint and power of immediate action in case of violation which subdues resistance. There is a complete subjection or *deditio* to the local sovereignty when it has the means, and capacity, and will immediately at hand to enforce obedience to its orders. (*Bradstreet v. Neptune Insurance Co.* :— New York.)

Physical  
force not in-  
dispensable.  
Embargo.

*Bradstreet  
v. Neptune  
Ins. Co. :*  
3 Sumner  
600.

But this is somewhat qualified by the rule that the vessel must be brought *infra præsidia* [p. 262].

A most important distinction is here pointed out between Prize Courts and Municipal Courts acting *in rem* ; as to the former there is a right of review vested in the courts of other nations ; but as to the latter ‘ they must be presumed ’ to have acted rightly, and there is no power of review : this, it will be remembered, was the gist of the contention on the subject of jurisdiction in the chapter on Defences, that there is a discretion vested in every state to regulate the jurisdiction of its courts, which is so far absolute, that it will only avail itself of it in the most extreme cases. The peculiar nature of a judgment *in rem* furnishes us with one of these cases : if a decision on the *status* of a thing with reference to property be pronounced when the court has not the thing in possession, such a sentence would manifestly be a nullity : but even this is again limited by admitting that the possession may be constructive.

Distinction  
between  
Prize and  
Municipal  
Courts  
acting *in  
rem*.

Municipal  
Courts must  
have the  
*res* in  
possession.

Reverting to prize decisions.

Admiralty  
Courts to  
condemn  
only within  
territory of  
belligerent.

The judgment of condemnation must evidently be by the courts of the belligerent power, within their own territory. Such

a sentence therefore, pronounced by a Court of Admiralty sitting under a commission from a belligerent power in a neutral country, will not be regarded :

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As in the case of *Donaldson v. Thompson*, where a Russian court sitting at Corfu pronounced the condemnation : and similarly in the case of *the Flad Oyen*, where a ship was taken by a French privateer and carried into Bergen, and underwent there a sort of process ending in the sentence of condemnation by the French Consul. Sir William Scott characterised this as 'a licentious attempt of the French Consul to exercise the rights of war within the bosom of a neutral country, where no such exercise has ever been authorised.' 'It is not to be presumed,' said the same judge in *the Christopher*, 'that a neutral government would so far depart from the duties of neutrality as to permit the exercise of that last and crowning act of hostility, the condemnation of the property of one belligerent to another : thereby confirming and securing him in the acquisition of his enemy's property by hostile means.'

*Donaldson v. Thompson.*  
1 Camp:  
429.  
*the Flad Oyen.*  
8 T. R. 27 on.

Duties of  
neutral  
government.

*the Christopher.*  
2 Rob: 209.

The court  
must be in  
belligerent  
state, and  
vessel *infra*  
*præsidia*.

Nor is it sufficient that the court of condemnation should be within the territory of the belligerent, the vessel itself must also be brought *infra præsidia*. In *the Henrick and Maria* a British vessel captured by a Dutch privateer was carried to Norway, put under the Dutch Consul there, and sold under a sentence of condemnation passed at the Hague. The sale was disregarded :— 'Formerly a simple capture was supposed to be sufficient : but in later times an additional formality has been required, that of a sentence of condemnation in a competent court decreeing the capture to have been rightly made *jure belli*. The purposes of justice require that such exercises of war should be placed under public inspection, and therefore the mere deduction *infra præsidia* has not been deemed sufficient. From the moment that a sentence of condemnation becomes necessary it imposes an additional obligation of bringing the property on which it is to pass into the country of the captors.' (Sir W. Scott.) Cf: also *Rose v. Himely* [New York]. This principle was followed in *Havelock v. Rockwood* and *the Kierlighett*.

*the Henrick & Maria.*  
4 Rob: 43.

Judgment  
given in  
country  
occupied by  
foreign  
power.

There is a French decision which may conveniently be noticed here. Judgments given in a country momentarily occupied by a foreign power, and emanating from tribunals instituted by that power in the place of the national tribunals, preserve their effect after the return of the country to its ancient sovereignty. For example, the English judgments given in Corsica during the

*Rose v. Himely.*  
4 Cranch  
241.  
*Havelock v. Rockwood.*  
8 T. R. 277.  
*the Kierlighett.*  
3 Rob: 96.

**Chapter IX.** occupation in 1824, were afterwards recognised by the courts at Bastia. (*Piedigriggio v. Comm: de Molifao.*)

*Piedigriggio v. C. de Molifao.*  
J. D. I. P.  
1876, p. 104.

From the judgments of Lord Ellenborough, C.J., in *Donaldson v. Thompson*, and of Sir William Scott in the *Flad Oyen*, some important principles may be gathered on the subject of neutrality.

‘That country is to be considered neutral in which the forms of an independent neutral government are preserved, although the belligerent has troops there as in reality to possess the sovereign authority.’ General principles of neutrality.

‘The Russians were visitors at Corfu, and not Sovereigns. While a government subsists as the government of the Ionian Republic did at Corfu, we can’t look to the degree in which it might be overawed by a foreign force.’

If however the country has become a co-belligerent or an ally in the war, the condemnation pronounced there will be received. But a government does not become a co-belligerent merely because it endures a hostile aggression, because it is obliged to yield to a superior force. (*Donaldson v. Thompson; the Christopher.*)

*Donaldson v. Thompson.*  
1 Camp:  
429.  
*the Christopher.*  
2 Rob: 209.

‘The rule is, that the *res* should be in the ports of the belligerent nation: very few deviations have taken place from this: much more ought the court adjudging prize causes to be there.’

‘The case might be altered if there were a treaty to make the place of adjudication a port of the belligerent country: but even then there would be much doubt.’

‘A neutral country has no cognisance whatever, except in the single case of an infringement of its own territory, although it might make a difference if acquiesced in in that country.’ (Lord Kenyon, C.J., *Smith v. Surridge.*)

*Smith v. Surridge.*  
4 Esp: 25.

The necessity for such a rule is evident: if there were no such rule, every port of every nation would become a port of condemnation. (*The Flad Oyen.*)

*the Flad Oyen.*  
6 T. R.  
270 n.

Leaving the question of jurisdiction, we come now to the question of procedure; what notice is to be given to the owners or parties interested in the property? The service in English Admiralty actions is regulated by Order IX, rules 10 to 14: the writ of summons is nailed on the mast of the vessel. ‘When the proceedings are *in rem* notice is served upon the thing itself. This is necessarily notice to all those who have any interest in

The notice necessary.  
O. ix,  
rr: 10-14.

'the thing.' (Marshall, C.J., *The Mary: Rose v. Himely*—New York.) Chapter IX.

Formal  
notice  
required.

The necessity for some formal announcement to the owners insisted on by Story, J., in *Bradstreet v. Neptune Insurance Co:* *the Mary*, 9 Cranch 126. [New York] :—'There must have been proper judicial proceedings upon which to found the decree; by which I mean, not 'that there should be regular proceedings according to the forms of our law, or even of the foreign law: but that there should be 'some certain allegation of the offence, or statement of the charge for which the seizure is made, and upon which the forfeiture is 'sought to be enforced: and that there should be some personal 'or public notice of the proceedings so that the parties in interest 'or their representatives or agents may know what is the offence 'with which they are charged, and may have an opportunity to 'defend themselves and disprove the charge.' What this notice shall be, or what opportunity shall be given to appear, must be regulated wholly by the local law where the proceeding takes place. 'If that law be pursued the requirement of notice to the 'party is fulfilled. The sufficiency of the notice or opportunity is 'not open to examination in the court where the foreign judgment 'in rem is produced.' (*Munroe v. Douglas*—New York.) It is not however necessary to bring the parties within the jurisdiction, it is sufficient if the property itself be within the power of the court.

Sufficiency  
of notice not  
examined.

In *Sawyer v. Maine Insurance Co:* [Massachusetts], a decree of condemnation of the island of Hayti for breach of blockade was rejected, no monition having been issued. *Munroe v. Douglas*, 4 Sandford 126.  
*Sawyer v. Maine Ins: Co:* 12 Mass: Rep: 291.

Condemna-  
tion of  
foreign  
exchequer  
courts.  
Revenue  
laws.  
[cf.  
chapter vii.]

On the subject of condemnations of foreign Exchequer Courts, a further question arises, whether, seeing that they depend upon the Revenue Laws of a foreign country, they really are entitled to recognition. It will be remembered that judgments proceeding on these laws are not recognised, on the theory that no state is bound to protect the revenue laws of another state. But where a vesting of property has been the consequence, the peculiar nature of a judgment *in rem* would perhaps entitle it to universal recognition: and the authority of *Hughes v. Cornelius* is in favour of this view:—'For suppose a decree here in the Exchequer, and 'the goods happened to be carried into another nation, should the 'courts abroad unravel this?' And in *Bradstreet v. Neptune Insurance Co:* [New York], Story, J., treated a foreign condemnation for illicit trading as entitled to universal recognition.

*Hughes v. Cornelius*, 2 Shower 232.

*Bradstreet v. Neptune Ins: Co:* 3 Sumner 600.



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Finally, we must consider the converse of condemnations,  
ACQUITTALS.

*Cooke v. Sholl.*  
5 T. R. 255.

The subject was argued in the case of *Cooke v. Sholl*, where an acquittal in the Exchequer was given in evidence. Lord Kenyon, C.J., said 'that he conceived that the judgment of acquittal, being 'a judgment *in rem*, was conclusive as to the question of the 'illegality of the seizure, and precluded all reasoning upon the 'construction of the permit.'

And Story says that 'it is wholly immaterial whether the judgment be of acquittal or condemnation.' [Conflict of Laws, § 592.] *Story.*  
§ 592.

But it is very doubtful whether an acquittal is equivalent to a judgment *in rem*, or is even in the nature of a judgment *in rem*.

In Bull's *Nisi Prius* [page 245] an acquittal is said not to be conclusive. And Sir Robert Phillimore says that the doctrine of an acquittal being absolute has been questioned:—'For the 'acquittal does not, like a conviction, ascertain any precise fact, 'and may have proceeded on the ground of insufficient evidence.'

Looking at the question theoretically, this certainly seems to be the true view of the case. For a judgment *in rem* vests a right in a certain person; and imposes on every one else the negative duty correlative to the right: but Theoretical  
view of the  
case.

An acquittal vests a right in a certain person; the obligation correlative however is positive, and is imposed exclusively upon the claimant who has seized the goods, to deliver them up to the owner: but it clearly does not vest the property in the goods in that person as against all the world; from its very nature it is only as against that claimant.

It would appear therefore, that an acquittal in reality is a judgment *in personam*: the error, if we may call it so, being traceable to the old confusion in the use of the words '*in rem*.'

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## CHAPTER X.

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WE must now proceed to the consideration of those judgments which decide questions concerning the status of persons : that is, affecting the legal position of those persons in or with regard to the rest of the community.

Judgments concerning status of persons.

The whole question of status or capacity has been elaborately treated by Story in the fourth chapter of the Conflict of Laws. It is sufficient here simply to refer to one or two general principles, to which we shall have to make frequent reference. There are many kinds of status ; but they may for our purpose be grouped under four heads. First, natural status, that of a minor, of a natural guardian, and by analogy of a deceased person at the time of death : this depends on the law of the domicil. Secondly, voluntarily assumed status, that of marriage with its consequences ; this depends on the law of the matrimonial home. Thirdly, involuntarily assumed status : that of a lunatic, or of a bankrupt ; this depends on the law of the usual residence. Fourthly, status by appointment : that of a guardian, curator, executor, administrator, trustee, or assignee ; this follows the third head, but the sphere of its operation is limited to the jurisdiction of the court making the appointment. A judgment on a question of status (subject to the limitation just noticed) is a judgment *in rem*. 'It is therefore 'if binding at all, not only a binding judgment as between the 'parties to the suit, but it is recognised as binding in all suits and 'between all parties. Such a judgment, when the jurisdiction of 'the court which made it is recognised, is treated as binding and 'final not only by the courts of the same country but by the courts 'of all countries.' (Brett, L.J., *Niboyet v. Niboyet*.)

Different kinds of status.

Judgment on status is a judgment *in rem*.

*Niboyet v. Niboyet*,  
4 P. D. 1.

The division of the subject will be as follows :—

Division of the subject.

Marriage. Legitimacy. Divorce.  
Lunacy.  
Guardianship.  
Probate and Administration.  
Bankruptcy.

## MARRIAGE—LEGITIMACY—DIVORCE.

## Chapter X.

- Marriage. 'Marriage,' said Lord Westbury in his judgment in *Shaw v. Gould*, 'is the very foundation of civil society, and no part of the laws and institutions of a country can be of more vital importance to its subjects than those which regulate the manner and condition of forming, and if necessary of dissolving the marriage contract.' It must be a matter of equal if not greater importance to English subjects to obtain a clear understanding of the manner and the circumstances under which the marriage contract may be affected or dissolved in a foreign state; to the subjects of other states in like manner, to ascertain how their marriages are liable to be dealt with by the English courts.
- Capacity to marry. The first question to be considered is necessarily the capacity to marry, as on this depends for the most part the validity of foreign sentences of nullity. In *Sottomayor v. De Barros*, Cotton, L.J., laid it down as a broad and well-recognised principle of law 'that the question of personal capacity to enter into a contract is to be decided by the law of the domicile,' and that, 'as in other contracts so in that of marriage, personal capacity must depend on the law of the domicile; and if the laws of any country prohibit its subjects within certain degrees of consanguinity from contracting marriage, and stamp a marriage between persons within the prohibited degrees as incestuous, this imposes on the subjects of that country a personal incapacity which continues to affect them so long as they are domiciled in the country where this law prevails, and renders invalid a marriage between persons both at the time of their marriage subjects of and domiciled in the country which imposes this restriction, wherever such marriage may have been solemnized.'
- Dependent on *lex domicilii*.
- Marriage abroad with deceased wife's sister. The very familiar application of this is to be found in the marriage abroad of an Englishman (domiciled in England) with his deceased wife's sister; if after-residence in England is contemplated it is perfectly immaterial whether such marriage was solemnized in a country where the laws allow it or not. In *Brook v. Brook*, a certain Englishman married his deceased wife's sister in Denmark. Lord Campbell, C., in the House of Lords expressed his adherence to this principle in an elaborate judgment from which the following propositions may be deduced. A marriage between a man and his deceased wife's sister being Danish
- Shaw v. Gould.*  
L. R. 3  
H. L. 55.
- Sottomayor v. De Barros.*  
3 P. D. 1.
- Brook v. Brook.*  
9 H. L.  
ca: 193.
- Propositions deduced from *Ld. Campbell's* judgment.

**Chapter X.** subjects domiciled in Denmark, is good all over the world. The same may be said even if they are native born English subjects who had abandoned their English domicile and are domiciled in Denmark. If the English domicile be not abandoned the English courts must hold their marriage invalid; but will the Danish courts also hold it invalid? It would seem to follow that they should, and the learned Lord Chancellor declared that although he was by no means prepared to say that that result would follow, yet his opinion was that it should :—‘the doctrine being established that the incidents of the contract of marriage celebrated in a foreign country are to be determined according to the law of the country in which the parties are domiciled and mean to reside, the consequence must follow that by this law must its validity or invalidity be determined.’ And in *Sottomayor v. De Barros*, Cotton, L.J., added to what is cited above, ‘It is proved that the courts of Portugal, where the petitioner and respondent are domiciled and resident, would hold the marriage void as celebrated between parties incapable of marrying and incestuous. How can the courts of this country hold the contrary and if appealed to say the marriage is valid?’ This principle was adopted in *Mette v. Mette*, where a naturalized Englishman married in Frankfort a sister by the half-blood to his former wife; on his return to England the second marriage was held void. The doctrine was also approved in *Conway v. Beazley*. But in *Gordon v. Nye*, Lord Meadowbank expressed an opposite view :—‘Would a marriage here be declared void because the parties were domiciled in England and minors when they married here, and of course incapable by the law of that country of contracting marriage?’ In *Simonin v. Mallac*, two French subjects had married in England without having performed the *acte formel et respectueux* required by the Code Napoléon, and for the absence of which Article 183 declares the marriage is null and void. It was contended that the parties being French, the law of that country affixed to them an incapacity to contract marriage without attending to the formalities prescribed, and that such incapacity was a personal status which travelled with them everywhere and rendered them incapable of making a valid contract in any other country. Sir Cresswell Cresswell held that this formal act was part of the marriage ceremony and therefore could not be required as an essential to a marriage celebrated in England although between domiciled Frenchmen. We shall have to consider this decision at a later stage.

*Mette v. Mette.*  
1 S. & T.  
461.

*Conway v. Beazley.*  
3 Hag.  
Eccl: 639.  
*Gordon v. Nye.*  
Ferg: Cons:  
361.

*Simonin v. Mallac.*  
29 L. J.  
P. & M. 97.

Absence of  
*acte formel et respectueux*  
not a  
personal  
incapacity.

In *Sottomayor v. De Barros*, Sir Robert Phillimore, who had been counsel in *Simonin v. Mallac*, and who still maintained his opinion that that decision turned on the question of personal capacity, considered himself bound by it and refused to hold a marriage null and void, which was between Portuguese domiciled subjects, first cousins, and illegal as incestuous by the law of Portugal. His lordship stated that the result of the decided cases was the doctrine that 'the court of the domicile recognises certain 'incapacities affixed by the law of the domicile as invalidating a 'marriage between parties belonging to that domicile in a foreign 'state in which such marriage is lawful.'

*Sir R. Phillimore's review of the cases.*

'But the decided cases, do not establish the converse doctrine, 'that the court of the place of the contract of marriage is bound 'to recognise the incapacities fixed by the law of the domicile on 'the parties to the contract, when those incapacities do not exist 'according to the *lex loci contractus*. It might appear that according to the *jus gentium* the latter proposition is a consequence of 'the former, and I remember addressing such an argument to the 'full Court of Divorce in *Simonin v. Mallac*, but in vain.'

Dis-  
approved  
by C. A.

It was on this point that the Court of Appeal reversed the decision; Cotton, L.J., holding that the learned judge had not fully appreciated the reasons given by Sir C. Cresswell in *Simonin v. Mallac* for refusing to recognise the French judgment: that consequently this second proposition was not an accurate statement of the law, but that the decided cases and all jurists agree in establishing the converse doctrine, that the incapacities fixed by the law of the domicile on the parties to the contract are to be recognised by the courts of the place of the contract.

*Sir J. Hannen doubted the rule as to capacity determined by lex domicilii.*

When however *Sottomayor v. De Barros* came a second time before the Divorce Court, the President, Sir James Hannen, took occasion to dissent from the broad principle which had been enunciated by the Court of Appeal:—'I doubt,' he said, 'it being a well-recognised principle; on the contrary it appears to me to be a 'novel principle for which up to the present time there has been 'no English authority; what authority there is seems to me to be 'the other way.' The learned judge then defined marriage to be a status arising out of a contract to which every country is entitled to attach its own conditions, both as to its creation and duration, and declared the decision of the Court of Appeal to be a definition of 'a further condition imposed by English law, namely, that 'the parties do not both belong by domicile to a country the laws 'of which prohibit their marriage:' while still approving Sir Cress-

Chapter X.

*Sottomayor v. De Barros.*  
2 P. D. 81.  
*Simonin v. Mallac.*  
29 L. J. P. & M. 97.

*Sottomayor v. De Barros.*  
5 P. D. 94.



**Chapter X.** well Cresswell's decision, he considered that the Court of Appeal had, without alluding to the arguments in that case, now to a certain extent overruled the opinion there expressed.

The same conflict of opinion is to be found in the writings of the civilians which are collected in Story's Conflict of Laws, [chapter iv. *et seq.*]. The solution of the difficulty is to be found in what we shall hereafter find to be the established principle governing the whole subject, that the *lex domicilii* is the guiding rule for determining everything in relation to the marriage contract, except as to the solemnities of it which alone are governed by the *lex loci contractus*. As we have pointed out the principle enunciated in *Simonin v. Mallac*, considered the formal act to be part of the ceremony, and not a personal incapacity such as minority.

The true rule suggested.

*Simonin v. Mallac.*  
29 L. J.  
P. & M. 97.

The decision as to the legitimacy or illegitimacy of the children follows immediately on the declaration of the validity or invalidity of the marriage. From what has been already said it seems that it is scarcely accurate to say that legitimacy is universally determined by the law of the domicile: for we have seen that where the ceremony has not been performed in accordance with the law of the place of the contract, the marriage will be held invalid; and in this one instance the legitimacy of the children depends upon the *lex loci contractus* of the parents' marriage and not upon the law of the domicile. A difficult question arises however in the case of legitimacy *per subsequens matrimonium*. The rule as to this is strictly that of the domicile. If there has been a subsequent marriage, and by the law of the domicile of the parties (which as we shall see hereafter is the domicile of the husband) legitimacy of children born out of wedlock follows, they are legitimate everywhere; and, unless of course that law require the subsequent marriage to be celebrated in the country of the domicile, it is immaterial where the marriage takes place. This was laid down by the House of Lords in *Dalhousie v. McDowall*, and *Munro v. Munro*, and was acted on by the Scotch courts in *Rose v. Ross*, where a Scotchman by birth settled in England, and had an illegitimate son born in this country; he was in the habit of making visits to Scotland, and during one of them, after a residence there of fifteen days, he married the woman, and then returned to and remained in England: the father's domicile being English the son was held not to have been legitimised by the Scotch marriage. This principle however was somewhat limited by the House of Lords in *Udny v. Udny*. In that case it was laid down that for the purposes of

Legitimacy.

Legitimation  
*per subsequens  
matrimonium.*

*Dalhousie v. McDowall.*  
7 Cl. & F.  
817.  
*Munro v. Munro.*  
7 Cl. & F.  
842.  
*Rose v. Ross.*  
4 Wils. & Sh: 289.

*Udny v. Udny.*  
L. R. 1 Sc:  
App: 441.

Father's  
domicil at  
time of birth  
of child  
the rule.

legitimation *per subsequens matrimonium*, the domicil which is to regulate the case is the father's domicil not at the time of the subsequent marriage, but at the time of the birth of the child. There is some doubt however whether the principle involved in this case can be received as general law or only as the law of England: it seems rather to have proceeded on a doctrine which we come across more than once, that an Englishman, though he may change his domicil as often as he please, cannot change his allegiance, and therefore cannot shake off its consequences according to the law of England. Chapter X.

But the result of the doctrine now under consideration was not adopted in *Birtwhistle v. Vardill*, where it was held that a child born in Scotland of parents domiciled there who had been legitimised by their subsequent marriage, could not take as heir English lands belonging to his father. The judges declared the principle of English law to be, that for a person to take lands by descent, he must be born in actual matrimony. Lord Brougham however doubted the justice of the decision of the House. *Birtwhistle v. Vardill.*  
2 Cl. & F.  
571  
7 id: 895.

We now come to the important question, what court has jurisdiction to dissolve the marriage tie?

Dissolution  
of marriage.

The old  
view of  
dissolubility  
of English  
marriage.

[*Harvey v.*  
*Farnie.*  
post p. 281.]

Indissolubility of the marriage contract when performed in England, and consequently indissolubility of marriage generally, except by the courts of the country in which the ceremony was performed, has formed the basis of arguments in our courts since the time of Lolley's famous case; it was never completely disposed of till quite recently by the unanimous decision of the President of the Divorce Court, the Court of Appeal and the House of Lords. The principles enunciated by Kindersley, V.-C., when *Shaw v. Gould* was before him (*in re Wilson's trusts*), by Lord Eldon, C., in *Tovey v. Lindsay*, and by Lord Brougham, C., in *McCarthy v. Decaix* (his judgment being a protest against what he conceived to be the injustice of the sentence pronounced against his former client Mr Lolley), have been declared to have proceeded on a misconception of what Lolley's case really decided, and are now overruled. But the doctrine of indissolubility being put on one side, it becomes necessary to find some guiding principle for determining whether any foreign sentence of divorce will be recognised in this country.

*re Wilson's Trusts.*  
35 L. J.  
Ch: 248.  
*Tovey v. Lindsay.*  
1 Dow: 117.  
*McCarthy v. Decaix.*  
2 R. & M.  
614.

The view  
that  
marriage is a  
civil contract  
and  
governed by  
*lex loci contractus*

We at once come across another doctrine which has occasionally met with judicial recognition. It is that marriage is a civil contract and is therefore to be judged of and governed, as all other contracts are, by the *lex loci contractus*. In a very old case,

**Chapter X.** *Scrimshire v. Scrimshire* [1752], the principle was broadly laid down by Sir Edward Simpson that marriage contracts are to be deemed good or bad according to the laws of the country in which they are formed. The last case in which it was expounded was in *Simonin v. Mallac*, when Sir Cresswell Cresswell said that it was the universal rule except in certain cases where it would give way to the *lex domicilii*, namely, in ‘marriages involving ‘polygamy and incest ; and those positively prohibited by the law ‘of a country, for example, by our Royal Marriage Act.’ But the inevitable consequence of this rule was very forcibly illustrated by the example given by Lord Brougham, C., in *Warrender v. Warrender*: If the law of the place of the contract were the sovereign rule, English courts would be bound to divorce Germans, married in Germany and domiciled in England, on the ground of incompatibility of temper. And in *Shaw v. Gould*, the House of Lords after very elaborate arguments refused to admit the doctrine as a sound one: the Lords were unanimous in saying that the marriage contract does not stand on the same footing as ordinary business contracts; and that the *lex loci contractus* is not the sovereign rule for determining, and is not necessarily to be adopted by the foreign court whilst it is determining ‘all questions as to the rights, duties and obligations ‘arising out of that relation, and the remedy or redress to be given ‘in the event of either party acting in violation of the contract.’ (Lord Colonsay.)

Consequence of the rule.

*Lex loci contractus* not the governing principle.

In certain cases however it may be necessary to take the *lex loci contractus* as the governing principle: for example; if the enquiry be whether the formalities necessary to constitute the relations have been complied with, as required by the law of the country where the marriage took place. But it is not an universal rule; and especially in the case of remedy or redress it is not to be applied:—‘If a divorce is to be regarded ‘as a remedy for the breach of the matrimonial contract, it is a ‘general principle of International Law that all remedies depend ‘upon the *lex fori*, and not on the *lex loci contractus*.’ (Lord Chelmsford.)

Where *lex loci contractus* to be followed.

But if not the *lex loci contractus*, what law is to be taken as the guiding rule? The answer is to be found in Lord Westbury’s judgment in the same case:—‘No nation,’ he says, ‘can be required ‘to admit that its domiciled subjects may lawfully resort to ‘another country for the purpose of evading the laws under ‘which they live.’ And that ‘when they return to the country of

*Scrimshire v. Scrimshire*, 2 Hagg. Const. 295.  
*Simonin v. Mallac*, 29 L. J. P. & M. 97.

*Warrender v. Warrender*, 9 Bl. N. S. 89.

*Shaw v. Gould*, L. R. 3 H. L. 55.

‘their domicile, bringing back with them a foreign judgment so Chapter X.  
 ‘obtained, the tribunals of the domicile are entitled, or even bound,  
 ‘to reject such judgment as having no extra-territorial force and  
 ‘validity. They are entitled to reject it, if pronounced by a  
 ‘tribunal not having competent jurisdiction; and they are bound  
 ‘to reject it if it be an invasion of their own laws and policy.’

*Lex  
domicilii* the  
governing  
principle.

The country of the domicile will not release its hold over those domiciled within it, and therefore, whether as to the validity of the marriage itself which we have already discussed, or on the more difficult question whether a foreign sentence of divorce will be recognised, the *lex domicilii* is to be taken as the sovereign rule, except so far as the formalities are concerned; the question whether the ceremony of marriage was validly performed is to be judged of by the law of the country where it took place. This rule may now be taken as the law governing the whole subject:

General rule. ‘The *lex loci contractus* is to be observed to determine the contract  
 ‘and its formation and validity; the rights consequential to and  
 ‘arising out of the contract when formed may have to be  
 ‘determined and ruled according to the laws of the domicile of the  
 ‘contracting parties if they were domiciled in a place not the  
 ‘*locus contractus*’ (Dr Radcliffe, *Steele v. Braddell*) putting this  
 rule in another form, it may be thus stated: the validity of the  
 marriage so far as the capacity or incapacity of the parties are  
 concerned depends upon the laws of their respective domiciles:  
 the validity of the marriage so far as ceremonial law is concerned  
 depends on the law of the country where it is performed. Thus in

*Steele v.  
Braddell.*  
Milw: 1r:  
Cons: 11.

Ceremonial  
validity.

*Herbert v. Herbert*, the validity of a marriage at Palermo according  
 to the law of Sicily was established; and in *Middleton v. Janverin*,  
 a marriage of English subjects abroad not according to the *lex loci*  
 was held invalid. The same rule was admitted in *Ward v. Dey*.  
 In *Ruding v. Smith* the marriage was at the Cape, and the con-  
 sent required by Dutch law had not been obtained: the marriage  
 was nevertheless held valid on the ground that the Cape had just  
 capitulated to the English, and although the Dutch law still  
 prevailed so far as the inhabitants were concerned, it could not be  
 said to apply to the conquerors, and in the case both parties were  
 English subjects.

*Herbert v.  
Herbert.*  
2 Hagg;  
Cons: 263.  
*Middleton v.  
Janverin.*  
2 Hagg;  
Cons: 437.  
*Ward v.  
Dey.*  
1 Robert 789.  
*Ruding v.  
Smith.*  
2 Hagg;  
Cons: 371.

But not void  
if foreign  
ceremony  
not  
complied  
with unless  
void by  
foreign law.

This principle must however be taken with a certain limitation  
 which was discussed by Dr. Lushington in *Catterall v. Catterall*,  
 and acted upon in *Lacon v. Higgins*. The ceremony must be in  
 accordance with the law of the foreign country, but it is not  
 necessarily void because that ceremony has not been complied

*Catterall v.  
Catterall.*  
1 Robert  
304-380.  
*Lacon v.  
Higgins.*  
3 Stark:  
178.



**Chapter X.** with : that in its turn must depend on the foreign law. If by that law the marriage is null and void then the marriage should be so held in whatever country the question is raised. But if the foreign law is simply directory, it will not be held to declare the marriage void. (See in a case on a similar English statute now repealed, *R. v. Inhabitants of Birmingham*.)

*R. v. Birmingham.*  
8 B. & C. 29.

Marriages of British subjects abroad are regulated by the statutes 4 Geo. IV. c. 91 ; 12 and 13 Vic. c. 68 ; and 28 and 29 Vic. c. 64. These statutes however do not remove the necessity of compliance with the forms and ceremonies prescribed by the law of the country in which the marriage takes place. (*Kent v. Burgess*.)

Marriages of British subjects abroad.

*Kent v. Burgess.*  
11 Sim: 361.

Before applying this rule to the question of foreign divorces, two minor points on the subject of domicil must be first disposed of.

First, what is meant by the expression domicil of parties? before the marriage is solemnized both man and woman have their own domicil, and by the law of that domicil their capacity respectively to contract is to be determined : but when they have become man and wife, the woman's domicil is entirely lost, the wife's domicil is that of her husband. 'In general,' says Story, 'the wife is deemed to have the same domicil as her husband ; and she can during coverture acquire none other, *suo jure*,' [Conflict of Laws, § 136]. 'She no longer retains any other domicil than his which she acquires. The marriage is contracted with a view to that matrimonial domicil, and it is within the meaning of such a contract that she is to become subject to her husband's law, subject to it in respect of the matrimonial relation and all other consequences depending upon the law of the husband's domicil' (Lord Selborne, C., *Harvey v. Farnie*).

Meaning of domicil of parties.

The wife's domicil that of her husband.

*Story.*  
§ 136.

*Harvey v. Farnie.*  
8 App: ca: 43.

A more difficult question arises when we have to consider whether this rule obtains under all circumstances. In the course of our enquiry we shall find cases where the husband has created a new domicil for the purpose of founding jurisdiction, and where the new domicil has been created after desertion : does this new domicil attach to the wife? Her domicil being founded upon the 'duty of the wife to live with her husband, and also on the presumption that he will be faithful to his marriage vow : if he commits an offence which entitles her to divorce or judicial separation, her legal duty to live with him must undergo considerable modification, and in some cases entirely cease, for continued cohabitation might be equivalent to condonation and

Exceptions to the rule.



'disentitle her to relief' (Sir R. Phillimore, *Le Sueur v. Le Sueur*). **Chapter X.** The better opinion seems to be therefore that the wife does not adopt the husband's new domicile; but on the other hand she cannot acquire any other domicile, but retains that of the marriage (Brett, L.J., *Niboyet v. Niboyet*). It is doubtful whether a domicile acquired for the purposes of jurisdiction changes even the husband's true domicile, it certainly cannot affect the wife's (*Allison v. Catley*).

*Le Sueur v. Le Sueur*.  
1 P. D. 139.  
*Niboyet v. Niboyet*.  
4 P. D. 1.

The period to which domicile relates.

Secondly, to what period does this domicile relate? It is quite clear that as to the validity of a marriage the domicile, the law of which is to govern the contract, is the husband's domicile at the time of the marriage: for it would be absurd to suppose that a subsequent change of domicile could effect a change in the status of the parties: for instance that a marriage between a domiciled Dane and his deceased wife's sister should become incestuous intercourse, if the domicile were afterwards changed from Danish to English. But on the question of jurisdiction to decree divorce the rule is, as we shall see, that the court of the domicile at the time of the commission of the matrimonial wrong is the proper tribunal to entertain it.

*Allison v. Catley*.  
Sc: Sess: Ca: 2nd ser: 1.  
1025.

Domicil means husband's domicile at time of marriage or at time of wrong.

When therefore we talk of domicile, we mean the husband's domicile, or place of permanent residence, he having no intention of permanently abandoning it, either at the time of the marriage or at the time of the commission of the matrimonial wrong; and not necessarily his domicile of origin; certainly not any fictitious or jurisdictional domicile.

A man must have a domicile.

It may be convenient to notice here a fundamental rule, that a man cannot be without a domicile, and if he has no permanent residence in any place, or if a permanent residence be suddenly and absolutely abandoned and no new place selected, then his domicile is that of origin.

We propose now to consider the many different cases that arise, by the light of the rule *lex domicilii*, and to notice how far it has been recognised in the decisions of the courts.

### I. *Marriage in England—Decree Abroad.*

i. Foreign decree dissolving marriage of foreigner domiciled abroad.

First where the husband is a foreigner and is domiciled abroad: the foreign decree will be recognised.

Thus in *Warrender v. Warrender*, a Scotchman by birth and domicile, married an Englishwoman in England: after their separation the husband lived in Scotland and the wife abroad: it was held that the Scotch courts had jurisdiction to grant a divorce:

*Warrender v. Warrender*.  
9 Bl: N. S.  
89.

**Chapter X** the same principle was acted on in *Maghee v. McAllister*, and *Geils v. Geils*; and in *Ryan v. Ryan*, where an Irishman by birth was domiciled in Denmark: the Danish decree of divorce was recognised in England. Again in *Harvey v. Farnie* a domiciled Scotchman married an Englishwoman in England and then returned to Scotland. In this case as we have said the old theory of indissolubility received its death-blow. 'Divorce,' said Cotton, L.J., 'is not an incident to the contract; it is not a question in any way depending upon the rule *lex loci contractus*. Any act done in violation of the duties incident to the status is a matter which concerns the country of the domicile, and divorce is an incident of the status.' In the House of Lords the argument was modified as follows, that at all events an English marriage is only dissoluble in the view of an English court, if dissolved by some other competent jurisdiction for a cause for which it might have been dissolved in England. But this is evidently another form of the rule *lex loci contractus*, that the contract wherever adjudicated upon is to be determined by the law of the place where it was made; but this as we have seen is not to be applied to marriage: 'indeed the principles of private international law point in the direction of the validity of such a sentence and of its recognition by the courts of other countries' (Lord Selborne, C.).

*Simonin v. Mallac*,  
29 L. J.  
P. & M. 97.

In *Simonin v. Mallac*, there was a marriage in England of two French people domiciled in France; the marriage was celebrated according to English law, but they came to England to avoid the provisions of the Code Napoléon which required an *acte formel et respectueux*, asking the father's consent, to be performed: the French courts had decreed the marriage null and void 'not because it was absolutely prohibited, but because of the formal intention of evading the French law.' The Judge Ordinary refused to recognise the French decree, and held the marriage valid. The principles involved in this case are three: first, there is a general recognition of the old rule of *lex loci contractus*; secondly, the decision that this formal act is part of the ceremonial law of France, and that its non-fulfilment does not attach a personal incapacity on the parties: and thirdly, that a judgment of the country of the domicile annulling the marriage on the ground of such an intentional evasion of the ceremonial law of that country will not be recognised in the country where the contract was entered into. As to the first point we see that the judgment was wrong. As to the second, with the greatest respect we venture to

Case of a marriage in England to avoid provision of Code Napoléon.

Principles involved.

*Maghee v. McAllister*,  
3 Ir. Ch.  
N. S. 604.  
*Geils v. Geils*,  
1 Macq.  
H. L. 255.  
*Ryan v. Ryan*,  
2 Phil.  
Ecc. 332.  
*Harvey v. Farnie*,  
8 App. ca.  
43.

think that the learned judge was also wrong : the formal act from **Chapter X.** its very nature seems to impose a personal incapacity on all French subjects : if it be purely ceremonial, then the consequence would be that English subjects domiciled in England but marrying in France would also have to perform it : if the second principle involved in the decision be wrong, so also must the third be : but if it be not wrong, then the third principle is one of the very greatest importance : admitting the question to be one of pure ceremony, so far the case is absolutely the same as if it were a question of contract : and one view of the decision is that a foreign court, competent by reason of the domicile of the parties, has pronounced a judgment which proceeds on an erroneous view of the *lex loci contractus*, or has refused (not wilfully) to be bound by that law : this, as we have seen from the general theory of the subject, is not a ground for rejecting the judgment ; and Sir Cresswell Cresswell expressly avoided adopting this as the ground of his decision. He pointed out that the French judgment proceeded on the ground of the evasion of the French law, *in fraudem legis* as it was called in an English case which will be shortly noticed ; therefore he rejected it, because it proceeded on the assumption that it was the law of France they were bound to obey, whereas it was the law of England. Now, we may put on one side the fact that the main principle adopted by the learned judge was wrong, for we should have arrived at the same point even if he had adopted the rule *lex domicilii*, the act being assumed to be a pure ceremony. This point of view, the only one from which the decision may be supported, is consistent with the general rules already laid down : one of those rules is that a violation of International law forms a good defence to a foreign judgment : and there was in the French judgment a violation of the rule of International law that the ceremony of marriage is to be judged of according to the *lex loci contractus*, and therefore the judgment may be disregarded. But if the question is not one of ceremony, then the judgment of the French court proceeded on a ground, not identical with, but analogous to the principle laid down in *Shaw v. Gould*. The English decision declares that jurisdiction to decree divorce, created *in fraudem legis*, will invalidate the decree : The French decision declares that a marriage *in fraudem legis* will be invalid ; and this certainly seems to be consonant with what has already been said on the subject. Additional doubt is thrown on this decision by the principle laid down by Dr. Lushington in *Catterall v. Catterall*, see p. 278. Its consequences

The decision considered.

*Shaw v. Gould*.  
L. R. 3  
H. L. 55.

*Catterall v. Catterall*.  
1 Robert  
304-380.

**Chapter X.** indeed were deplorable, the parties were declared to be unmarried  
 ——— in France, but married in England.

The second case is where the husband is an Englishman domiciled in England: the general rule is that the foreign decree will not be recognised. The recent case of *Briggs v. Briggs* is a simple illustration of the rule. The parties were domiciled English subjects married in England. In course of time the husband went to Kansas, and after a year's residence there presented a petition and obtained a divorce on the ground of his wife's desertion. The court considered the question whether he had any domicile in Kansas, and found that he had not, there being strong evidence of *animus revertendi*. The man having married again, the wife obtained a decree of divorce on the ground of bigamy and adultery. So in *Tollemache v. Tollemache*, where a Gretna Green marriage was dissolved by the Court of Session for adultery by the woman in Scotland; the sentence was rejected, the husband not having abandoned his English domicile. Under this rule come also what are known as Scotch Divorces which raise the complicated question of conflict of domicile.

ii. Foreign decree dissolving marriage of Englishman domiciled in England.

*Briggs v. Briggs*,  
 5 P. D. 163.

*Tollemache v. Tollemache*,  
 30 L. J. P. & M. 113.

*Ringer v. Churchill*,  
 Sc: Sess: Ct: 2nd ser: II. 307.

The general rule of the Scotch courts on the subject of jurisdiction, which was very fully explained in *Ringer v. Churchill*, is as follows: A foreigner may, as in England, bring an action in Scotland subject to giving security for costs if he is not resident in the kingdom: but in order to render a foreign defendant amenable in an action, he must have resided in the country for forty days: it is not sufficient, as in England, that he be simply within the territory in order to make his obedience to the writ necessary. Now the English courts do not extend their rule to actions of divorce, but the Scotch courts do. It is very necessary to keep this rule clearly before us, because many erroneous notions are entertained on the subject: indeed it is sometimes said that this rule of jurisdiction has been made in Scotland with a special view to divorcing English subjects.

The Scotch rule as to jurisdiction. [cf: p. 238.]

how it differs from the English rule.

*Shaw v. Gould*,  
 L. R. 3 H. L. 55.  
*Lolley's case*,  
 2 Cl. & F. 567.

The leading case is *Shaw v. Gould*, in which *Lolley's case* was explained to have decided this point, and no more:—‘The Scotch court has no power to dissolve an English marriage, where the parties are not domiciled in Scotland, but have gone there only for such time as would render them amenable to the jurisdiction of the Scotch courts.’ The facts in *Shaw v. Gould* were these: a man was desirous of marrying a married woman: they induced the husband to reside in Scotland for forty days in order to allow

Rule in *Lolley's case*.

the wife to bring an action for divorce against him. A sum of money was to be paid to him when the decree was obtained, and he was restrained from any attempt to defeat the proceedings by the imposition of a forfeiture of the money in case he should 'by himself, or by any one through him, give information which should be 'prejudicial to the divorce.' The House of Lords held that the divorce could only be valid by the laws of Scotland, and was therefore restricted in its effect to that country: but that in England it could not be regarded as having any binding effect, on account of the domicile being only for the purposes of jurisdiction, and because that domicile had been created in order to evade the laws of England.

Domicil for the purpose of jurisdiction.

*Shaw v. Gould* considered.

Domicil for jurisdiction not a true domicil.

Rules deducible.

Limitation.

Dependent on object of residence.

Question involved in decree of nullity.

The first ground of this decision is, as has already been stated, that although the foreign court, before it assumes jurisdiction over a defendant, requires a certain period of residence to which the *name* of domicile is applied, yet this is not a true domicile; not such a domicile as terminates the previous domicile of actual and permanent residence, and consequently the court of the true domicile will not recognise the divorce. So that we have now two rules; the foreign divorce will not be recognised either when the jurisdiction is founded on simple residence; nor when that residence is for a specified period and called a domicile by the foreign law: but it would seem that both these in their turn must be governed by the limitation, that the party, who has thus become subject to the foreign jurisdiction, must have gone to that country with the intention of becoming subject thereto for the sole object of obtaining a divorce.

It is necessary to pause for one moment to consider the object of this visit, and why this intention has been termed *in fraudem legis*. We have said that the *validity* of the marriage is to be determined by the *lex domicilii* of the time of the marriage: and that consequently a change of domicile cannot possibly alter the status once acquired: so far therefore as decrees of nullity are concerned, the law to be applied is the law of this domicile; as in the case of civil contracts the *lex loci contractus* will be administered even by a court in another country having jurisdiction in the matter, so in the case of the marriage contract, this primary *lex domicilii* will be applied *in questions of nullity*, even by a court in another country having jurisdiction in the matter by reason of an absolute and subsequent change in domicile. But a change of domicile imports obedience to the laws of the new domicile, and therefore a violation of these laws in matrimonial matters will give



**Chapter X.** its courts jurisdiction to apply the remedies supplied by its laws : taking the wrong to be the husband's adultery, if the remedy in that country be divorce, the parties will be divorced ; if the remedy be only judicial separation, that will be the form of the decree : therefore *in questions of divorce*, it is not the law of the domicile of the time of marriage that applies, but the law of the domicile at the time of the wrong.

Question involved in decree of divorce.

Now, judicial separation being the remedy for the husband's adultery in this country, but divorce being the remedy in Scotland, if jurisdiction is given voluntarily to the Scotch courts by people domiciled in England, it is evident that there is an intention to evade the laws of the actual domicile and a decree pronounced in Scotland will not be recognised : the reason is the same as before, that it has proceeded on an erroneous interpretation of International Law.

Intention to evade English laws.

But it is doubtful whether this rule would apply where the second domicile was an actual and permanent domicile, even though acquired with the express object of obtaining the divorce : In such a case the question could only arise if the parties returned to this country, and it would then be a very difficult task for them to establish satisfactorily the acquisition of the second domicile.

Where second domicile is permanent.

But supposing the Scotch court to administer the law of England, and only to decree judicial separation, it might possibly be doubted whether it would not be upheld in this country : although *Tollemache v. Tollemache* and the dictum of Brett, L.J., in *Niboyet v. Niboyet* [p. 290], support the opposite view.

*Tollemache v. Tollemache*, 30 L. J. P. & M. 113.  
*Niboyet v. Niboyet*, 4 P. D. 1.  
*Simonin v. Mallac*, 29 L. J. P. & M. 97.  
*Lolley's case*, 2 Cl. & F. 567.  
*Shaw v. Gould*, L. R. 3 H. L. 55.  
*Briggs v. Briggs*, 5 P. D. 163.  
*Dolphin v. Robbins*, 29 L. J. P. & M. 11.

The distinction between this principle and that laid down in *Simonin v. Mallac* must also be borne in mind ; a visit to another country in order to avoid the ceremonial law of the country will not be considered *in fraudem legis*. Shortly then the decisions in *Lolley's case*, *Shaw v. Gould* and *Briggs v. Briggs*, and also that in *Dolphin v. Robbins* (on the authority of Lord Cranworth who delivered the judgment), must be taken to be identical ; and with regard to the question of jurisdiction, or jurisdictional domicile created by the intention of the parties to have gone no further than the rule in *Lolley's case* as it is given above.

Intention to avoid ceremonial law.

'But, if you put the case,' said Lord Colonsay, 'of the parties resorting to Scotland with no such view, and being resident there for a considerable time, though not so as to change the domicile for all purposes ; and then suppose that the wife commits adultery in Scotland, and that the husband discovers it, and

Not *in fraudem legis*. No intention of residing, or of invoking foreign court.

‘immediately raises an action of divorce in the court in Scotland Chapter X.  
 ‘where the witnesses reside, and where his own duties detain him,  
 ‘and that he proves his case and obtains a decree, which decree  
 ‘is unquestionably good in Scotland, and would, I believe, be  
 ‘recognised in most other countries; I am slow to think that it  
 ‘would be ignored in England, because it had not been pro-  
 ‘nounced by the Court of Divorce here. How would the Court  
 ‘of Divorce here deal with the converse case?’

This question was raised as a very doubtful one by Lord Chelmsford; and also by Dr. Lushington in *Conway v. Beazley*. ‘A *Conway v. Beazley*, 3 Hag. : Eccl. : 639.  
 ‘question of greater difficulty,’ said Lord Chelmsford is, ‘what is  
 ‘the effect of a Scotch divorce upon an English marriage where  
 ‘the parties do not afterwards become domiciled in Scotland, nor  
 ‘have resorted thither with the design of invoking the jurisdiction  
 ‘of the court; but where, happening to be in the country, one of  
 ‘them applies for and obtains a divorce. I cannot subscribe to  
 ‘Lord Cranworth’s dictum in *Dolphin v. Robbins*, that it must be *Dolphin v. Robbins*, 29 L. J. : P. & M. 11.  
 ‘taken now as clearly established that the Scotch court has no  
 ‘power to dissolve an English marriage where the parties are not  
 ‘really domiciled in Scotland.’ At the close of the judgments Lord  
 Cranworth himself agreed with the view taken by Lord Chelmsford.

Example of  
*animus*  
*revertendi*.

On the other hand we have the case of *Pitt v. Pitt*, which was *Pitt v. Pitt*, 4 Macq. : H. L. 627.  
 decided by the House of Lords in 1864; the counsel for Colonel  
 Pitt, the respondent, admitted with the full approval of the  
 House, that the sentence of divorce which had been obtained in  
 Scotland could not be upheld unless it could be shown that before  
 and during the suit Colonel Pitt was permanently domiciled in  
 Scotland; he had at one time been ‘dodging about’ to avoid his  
 creditors, but at the time of the suit he had taken a six years’ lease  
 of a house, and the Lord Ordinary considering that he had adopted  
 a settled mode of residence thought that he was absolutely domi-  
 ciled in Scotland and granted the divorce; but the Lords were of  
 opinion that he had no such domicil, that he had no intention  
 of quitting *de facto et ex animo* his English domicil, and that the  
 evasion of the creditors pointed clearly to the existence of an  
*animus revertendi*, and held therefore that the Scotch court had  
 no jurisdiction to pronounce the decree of divorce.

It is exceedingly difficult to reconcile the decision of the  
 House in 1864 with the *obiter dicta* pronounced in 1868. And  
 it is rendered more difficult from the fact that *Pitt v. Pitt* was a  
 Scotch appeal, requiring the interpretation of Scotch law, while  
*Shaw v. Gould* was an English appeal, in which Scotch law *Shaw v. Gould*, L. R. 3 : H. L. 55.

**Chapter X.** would be treated as foreign law : yet the former decision is the more stringent of the two. The result of the two cases seems however to be this, that the Scotch law rightly interpreted requires an absolute domicil : but the English courts will recognise a foreign divorce of English domiciled subjects founded on something less than absolute domicil. It is difficult to ascertain what the test really is ; on the one hand the requisite domicil has been sometimes called '*bona fide*' : sometimes 'real,' or 'complete' : sometimes, 'for all purposes' : each of these terms meaning less than 'domicil' : on the other hand, as we have already seen, they imply something more than mere residence, and something not adopted *in fraudem legis* : perhaps the mean may be found in the term 'matrimonial home,' which we shall find used with reference to the jurisdiction belonging to the English Divorce Court, because this carries with it the impression of a *bona fide* settlement in the country of both parties.

General result from the two cases.

The test of domicil.

The second point raised by the decision in *Shaw v. Gould* is collusion.

Collusion.

We have been considering the case of an arrangement between the parties to found the jurisdiction of the foreign court : this if *in fraudem legis* is sufficient of itself to invalidate the decree : but the Lords carefully avoided calling this collusion, even though it were stipulated that one of the parties should receive a sum of money when the divorce was obtained : the restraint however from any attempt to defeat the proceedings by the imposition of a forfeiture was held both in this case, and in *Dolphin v. Robbins*, to be collusion. But if the mutual arrangement be not *in fraudem legis*, which would be the case where the remedy for the matrimonial wrong is the same in both countries, it seems that any arrangement to bring the facts before a court of competent jurisdiction, however purchased or obtained, is unobjectionable. Sir William Scott approved of this theory in *Crewe v. Crewe*, where he thus defined the collusion which would be sufficient to invalidate the decree :—'Collusion is an agreement between the parties 'for one to commit, or appear to commit, a fact of adultery in 'order that the other may obtain a remedy at law for a real 'injury : but it is not proof of collusion that after the crime is 'committed both parties are desirous of a separation.'

Example.

Definition.

*Dolphin v. Robbins.*  
29 L. J.  
P. & M. 11.

*Crewe v. Crewe.*  
3 Hagg.  
Eccl. 130.

It is doubtful whether the same rules apply to the case of a marriage in England between foreigners domiciled in England, Lord Westbury having confined his remarks to 'domiciled subjects.' iii. Foreign decree dissolving marriage in England of

foreigner  
domiciled  
here.

When we come to consider the converse case we find the doctrine of allegiance overriding the doctrine of domicile : and it may well be that the English courts would admit the validity of a divorce pronounced by the courts of the country of which the husband was a subject, although he were domiciled in England. Chapter X.

iv. Foreign  
decree  
dissolving  
marriage in  
England of  
Englishman  
domiciled  
abroad.

This converse case is the last under the first division of the subject : a foreign divorce of an Englishman married in England, but domiciled in the foreign country. This would really seem to be already disposed of by the discussions under the second head, the result of those discussions being that the divorce will be recognised. But in *Deck v. Deck*, Sir Cresswell Cresswell declared that ‘allegiance was not shaken off by change of domicile,’ and that the husband, though he had acquired a domicile in America, still owed allegiance and obedience to the laws of England. It is true that in this case there was no American divorce ; but the principle laid down seems capable of an extension somewhat antagonistic to the recognition of a foreign decree given under such circumstances.

*Deck v.*  
*Deck.*  
2 S. & T. 90.

Allegiance  
not shaken  
off.

## II. *Marriage abroad—Decree abroad.*

Foreign  
decree  
dissolving  
marriage  
celebrated  
abroad.

It has been convenient to notice the place of the marriage, both on account of the old theories on the subject, and the necessity of ascertaining the *lex loci contractus* in matters relating to the ceremony. But, as we have seen, the place of the domicile at the time of the matrimonial wrong being the all-important element with regard to decrees of divorce ; the domicile at the time of the marriage, with regard to decrees of nullity ; the rules as to the recognition of sentences arrived at in the four cases just considered under the first division will evidently apply to the corresponding cases in this division.

## III. *Marriage in England or abroad—Decree in England.*

English  
decree  
dissolving  
English or  
foreign  
marriage.

We now come to the important question of the jurisdiction of the English court in matters of Divorce.

‘I should have been glad,’ said Sir Cresswell Cresswell in *Forster v. Forster*, ‘if the legislature had said that this court had no jurisdiction except over persons domiciled in England. When Lord Campbell was Lord Chancellor I asked him to bring in a bill to define my jurisdiction, but he said whenever that question is raised it must be decided upon legal principles : it cannot be defined.’

*Forster v.*  
*Forster.*  
3 S. & T.  
151.

**Chapter X.** The simple case of an Englishman domiciled in England falls within the scope of text-books on the Law and Practice of Divorce in England, and does not require consideration here.

i. Englishman domiciled in England.

The rule of jurisdiction of the Divorce Court differs from that of the Common Law Courts, the mere presence of the respondent within the jurisdiction not being sufficient to entitle the petitioner to serve the citation upon him; and on the other hand, the provisions of Order XI of the Judicature Act, as to service out of the jurisdiction, do not apply to suits for divorce.

Rule of jurisdiction in Divorce Court.

*Ratcliffe v. Ratcliffe*,  
1 S. & T.  
467.

The general rule laid down in *Ratcliffe v. Ratcliffe*, 'when the domicile of the parties is English, the jurisdiction of the court is founded though the marriage and adultery may have taken place abroad,' would seem to include the second case of a foreigner domiciled in England; in fact the rules already discussed clearly support the proposition.

ii. Foreigner domiciled in England.

The first difficulty we meet with is in the third case, which is that of an Englishman domiciled abroad.

iii. Englishman domiciled abroad.

*Deck v. Deck*,  
2 S. & T. 90.  
*Bond v. Bond*,  
2 S. & T. 93.

As we have already pointed out the principle was laid down in *Deck v. Deck*, and followed in *Bond v. Bond*, that although the husband has really acquired a foreign domicile, yet he cannot shake off his allegiance to this country: therefore, where the wife had remained in England, it was held that the court had still jurisdiction to pronounce a decree of divorce against the husband. It might appear at first sight that this was an instance of the wife's domicile not following the husband's: but the learned judge certainly did not limit the application of the principle to a case of desertion, for he expressed his opinion that the words 'any wife' in section 27 of the Matrimonial Causes Act, 1857, 'must certainly include any wife being an English natural-born subject.' It will be remembered that this theory of allegiance was mentioned with approval by the House of Lords in *Udny v. Udny*.

Allegiance.

*Udny v. Udny*,  
L. R. 1 Sc:  
App: 441.

The last case, and that in which most of the perplexing questions arise, is that of a foreigner domiciled abroad: this was discussed by the Court of Appeal in the recent case of *Niboyet v. Niboyet*.

*Niboyet v. Niboyet*,  
4 P. D. 1.

iv. Foreigner domiciled abroad.

Discussed in recent case in C.A.

The marriage was solemnised at Gibraltar, the husband was French, the wife English. They had resided several years in England, but the husband being a French consul retained his domicile of origin. The adultery and desertion took place in England. Appearance was entered under protest. The Court of Appeal, Brett, L.J., dissenting, held that the court had juris-



diction to entertain the suit, and reversed Sir Robert Phillimore's decision. Chapter X.

Fiction of  
consular  
domicil.

The first thing to be noticed is that the case is encumbered by a fiction of the law of domicil. The husband residing in this country merely as consul from a foreign state, it was impossible for him to acquire an English domicil. This being so, in the first place, the *lex domicilii* applying to the case, it would not be the English law but the French law that would govern it: but as we have pointed the rule *lex domicilii* refers not only to the law by which the case is to be decided, but also to the court which is to administer the law; and therefore, the case would not properly be heard by the English court but by the French court. This view of the law was taken both by Sir R. Phillimore and Lord Justice Brett:—‘The law,’ said the learned Lord Justice, ‘which enables a court to decree an alteration in the relation between husband and wife or an alteration in the status of husband and wife as such is as matter of principle the law of the country to which by birth and domicil they owe obedience. The only court which can decree by virtue of such law is a court of that country. If the courts of any country should assume by a decree of divorce or any other decree, to alter that relation or status of a foreigner not domiciled therein, the decree would not be recognised as binding by the courts of any other country.’ ‘The domicil of the husband at the institution of the suit is the fact which gives jurisdiction to the English Divorce Court to decree divorce: with such domicil the court has jurisdiction over a foreigner as well as over an English subject: without such domicil the court has no jurisdiction though the party is an English subject. It applies therefore as it seems to me to suits for judicial separation and to suits for restitution of conjugal rights: I do not think it does apply to suits for a declaration of nullity of marriage or in respect of jactitation of marriage.’ In the last two cases the domicil at the time of the marriage is, as we have said, the important fact.

Converse  
case of  
*Shaw v.*  
*Gould*  
considered.

Now if we revert for one moment to the decision in *Shaw v. Gould* which is the converse case, a foreign decree against a domiciled Englishman, the principle there laid down was that an English court would recognise such a decree although the English domicil had not been cast aside, if the jurisdiction of the foreign court was based on a residence short of actual domicil. We can apply that principle to such a case as the present: an English consul who had resided abroad with his wife for some lengthy

*Shaw v.*  
*Gould*.  
L. R. 3  
H. L. 55.

**Chapter X.** period, and a suit ending in a divorce in that country: such a divorce would clearly be recognised. We cannot therefore be surprised at finding the rule of English jurisdiction shaped so as to agree in principle with the rule already received as to the recognition of foreign sentences. This was the conclusion arrived at by Lord Justice James who delivered an elaborate and historical judgment, tracing the growth of the rule he enunciated from the practice of the old ecclesiastical courts. 'I do not find,' he said, 'any violation of the comity of nations in the legislature of a country dealing as it may think just with persons native or not native, domiciled or not domiciled, who elect to come and reside in that country, and during such residence break the laws of God or of the land.' He then proceeded to attack the rule *lex domicilii* in its strict application, and laid down what we may call the rule of the matrimonial home. 'It appears to me to be a violation of every principle to make the dissolubility of a marriage depend on the mere will and pleasure of the husband, and domicile is entirely a matter of his will and pleasure. Where the matrimonial home is English, and the wrong done here, then the English jurisdiction exists and the English law ought to be applied.'

The English rule of jurisdiction made to agree with former decisions on foreign decrees.

James, L.J., laid down the rule of the matrimonial home in lieu of *lex domicilii*.

This case must now be taken as embodying the law on the subject, and as governing the previous cases where there is any difference between them. In *Callwell v. Callwell* the husband was domiciled in Ireland and had only a temporary abode in England at the time of his filing the petition: but the wife appeared and submitted to the jurisdiction of the English court, and on this ground the decree was pronounced; and for the same reason Sir Cresswell Cresswell refused to go into the question of jurisdiction in *Forster v. Forster*. In *Brodie v. Brodie* the principle adopted was that a *bona fide* residence in this country, not casual or as a traveller, was sufficient to found the jurisdiction of the court against the wife who had committed adultery in Australia during that residence; and this was followed in *Manning v. Manning*, the learned Judge Ordinary expressly declaring his desire of assimilating the rule of English jurisdiction to that of recognition of foreign sentences.

Review of previous cases.

*Callwell v. Callwell*,  
3 S. & T.  
259.

*Forster v. Forster*,  
3 S. & T.  
151.  
*Brodie v. Brodie*,  
2 S. & T.  
259.  
*Manning v. Manning*,  
L. R. 2  
P. & D. 223.

*Harford v. Morris*,  
2 Hagg.  
Cons: 423.

In *Harford v. Morris*, Sir George Hay said that he conceived that the law was clear that it was not transient residence by coming one morning and going away the next day which constitutes a residence to which the *lex loci* could be applied, so as to give jurisdiction to the law, and cause it to take cognisance of a

marriage celebrated there; but that it was certain that domicile or **Chapter X.**  
established residence might have that effect. In *Yelverton v.* —————

*Yelverton*, Sir Cresswell Cresswell considered the question whether, <sup>*Yelverton v.*  
*Yelverton.*  
1 S. & T.  
574.</sup> although the domicile of origin was retained, there was not also a domicile in England sufficient to give jurisdiction to the court:

the sojourn in England being only of a temporary nature, the learned judge held there was no jurisdiction. In *Wilson v.* <sup>*Wilson v.*  
*Wilson.*  
L. R. 2  
P. & D. 435.</sup> *Wilson* it was not disputed that if the petitioner, the husband, were domiciled in England when the suit was commenced, the court would have jurisdiction; Lord Penzance found that he was so domiciled; he doubted however whether residence short of domicile could be sufficient, his view being that 'parties in all

'cases should refer matrimonial differences to the courts of their 'domicil.' In *Le Sueur v. Le Sueur*, the marriage took place in Jersey, and there also were the matrimonial home and the domicile.

The husband deserted the wife and went to reside in the United States, the wife became permanently resident in England, but the husband had never resided here. She instituted a suit here for dissolution of marriage by reason of his adultery and desertion, but Sir R. Phillimore held that the court had no jurisdiction, even supposing it could be said that the wife's permanent residence in this country were in effect a domicile separate from that of her husband: the suit was therefore dismissed. But in *Santo Teodoro v. Santo Teodoro*, the husband was a Neapolitan and the wife English. She had agreed to marry on his promising to live in England six months out of every year, and up to the time of the suit this promise had been kept. Sir R. Phillimore said that he was satisfied that the husband, the respondent, was subject to the jurisdiction on the ground of the long cohabitation in this country.

These cases all shew a very strong leaning, some more, some less, towards a rule of jurisdiction based on something less than absolute domicile; and as we have said, the rule may now be taken to be established by the decision of the Court of Appeal to be that of the matrimonial home.

One important point dependent upon the law of the wife's domicile must not be forgotten: the question is not the domicile of the petitioner or of the respondent, but the domicile of the husband; in the case of desertion it is the original domicile of the husband: if the suit is brought by the wife, the court must have jurisdiction over the husband; if the suit is brought by the husband, the wife's residence is immaterial, so long as there is jurisdiction over the husband.

The old cases all tend towards the rule laid down by *James, L.J.*

Domicil of petitioner not necessarily regarded.

*S. Teodoro v. S. Teodoro.*  
5 P. D. 79.

**Chapter X.** In the case of a suit by the wife for restitution of conjugal rights however the court requires not only domicile but residence by the husband within the jurisdiction, because it is a suit to control the husband, and if he is a foreigner out of the jurisdiction he cannot be controlled (*Firebrace v. Firebrace*).

*Firebrace v. Firebrace.*  
4 P. D. 63.

Rule in suits for restitution of conjugal rights.

### *Service out of the Jurisdiction.*

The jurisdiction of the court being established, the citation and petition may be served on the respondent although he or she is out of the jurisdiction. This in England is regulated by section 42 of the Matrimonial Causes Act, 1857. It is somewhat remarkable that although the legislature, for the reasons stated on page 225, has provided for the service of notice of a writ in lieu of writ on foreigners out of the jurisdiction, it has not provided for the service of notice of a citation in lieu of citation.

20 & 21 V. c. 85, s. 42. Service of citation and petition out of jurisdiction.

#### *20 & 21 Vic: c. 85.*

s. 42. Every such petition shall be served on the party to be affected thereby, either within or without her Majesty's dominions, in such manner as the court shall by any general or special order from time to time direct, and for that purpose the court shall have all the powers conferred by any statute on the Court of Chancery: provided always that the court may dispense with such service altogether in case it shall seem necessary or expedient so to do.

'Such petitions' includes all petitions in the Divorce Court except those for restitution of conjugal rights (*Firebrace v. Firebrace*).

The section applies both to British subjects and to foreigners. It is to be observed that the citation itself is allowed to be served out of the jurisdiction on foreigners, and not a notice of it as in the case of a writ in an ordinary action: this is the more remarkable because the notice in lieu of writ is required to be served on all foreigners quite irrespective of whether they are domiciled or usually resident in this country.

Section applies to subjects and aliens.

The proviso to the section is important; the service may be dispensed with altogether if the court think fit.

Proviso, that service may be dispensed with.

If the husband's residence abroad be known the citation must be served. In *Rowbotham v. Rowbotham*, the Judge Ordinary recommended that the citation and copy of the petition should be sent out to the British Vice-Consul in New York, with instructions to send back the citation when served, with an affidavit of service. Service by an agent of the English firm of solicitors would naturally

*Rowbotham v. Rowbotham.*  
27 L. J.  
P & M. 33.

be the most usual course to adopt. If the residence abroad be not known and every effort has been made to discover the respondent's whereabouts, service will be dispensed with (*Chandler v. Chandler*; *Cook v. Cook*). But the court will not act until it is satisfied that every effort has been made (*Sudlow v. Sudlow*). The same remarks apply to service, or dispensing with service on a co-respondent.

Chapter X.

*Chandler v. Chandler.*  
27 L. J.  
P. & M. 35.  
28 id: 6.  
*Cook v. Cook.*  
28 L. J.  
P. & M. 5.  
*Sudlow v. Sudlow.*  
29 L. J.  
P. & M. 4.

## NOTE ON MRS BULKLEY'S CASE.

*Appendix to PITT v. PITT.* [4 *Macqueen's H.-L. cases*, 676.]

Note on  
Mrs.  
Bulkley's  
case in  
France.

Mrs Bulkley having married a resident of Holland, was divorced there: The inferior court in France held that she was incapable of contracting marriage in that country: The Cour de Cassation however reversed this decision, and held that having been legally divorced abroad, she was free to marry again in France.

### JUDGMENT OF THE COUR DE CASSATION.

Judgment  
of Cour de  
Cassation.

The references were to articles 3, 6, and 147 of the Code Napoléon; and to Article 1 of the Law of May 8, 1816. The Court proceeded—

‘Attendu que le mariage, en France, est un contrat civil; qu’il ne peut être interdit qu’à ceux qui ont en eux un motif d’empêchement établi par la loi civile;—

‘Attendu que si l’Art: 147 du Code Napoléon défend de contracter un second mariage avant la dissolution du premier, cette défense n’existe pas toutes les fois que la preuve de la dissolution du premier mariage est rapportée;

‘Que cette preuve est faite de la part de l’étranger, marié à l’étranger, lorsqu’il établit que son mariage a été dissous dans les formes et selon les lois du pays dont il était sujet;—Que telle est la conséquence du principe, reconnu par l’Art: 3, Code Napoléon, de la distinction des lois réelles et des lois personnelles, que celles-ci, qui régissent l’état et la capacité des personnes, suivent les Français, même résidants en pays étranger; et suivent également en France l’étranger qui y réside;—

‘Que c’est donc par les lois de son pays, par les faits accomplis dans ce pays conformément à ses lois, que doit être appréciée la capacité de l’étranger pour contracter mariage en France; qu’ainsi, l’étranger, dont le premier mariage a été légalement dissous dans son pays, soit par le divorce, soit par toute autre cause, a acquis définitivement sa liberté et porte avec lui cette liberté partout où il lui plaira de résider:—

\* \* \* \* \*

‘La loi Française a confirmé le respect dû aux législations étrangères statuant sur l’état et la capacité des personnes soumises à leur souveraineté;

‘Attendu, en fait, qu’il était constaté, et qu’il n’est pas contesté par l’arrêt attaqué, que Mary Anne Bulkley, Anglaise d’origine, mariée en Hollande avec Anthony Bouwens, sujet Hollandaise, avait été divorcée en 1858 par jugement du tribunal de La Haye, inscrit sur les registres de l’état civil conformément à la loi du pays.’

‘Que, par conséquent, Mary Anne Bulkley, lorsqu’elle se présentait en 1859

Facts of  
the case.



**Chapter X.** ‘ devant l’officier de l’état civil du 10<sup>m</sup>e arrondissement de Paris, pour contracter  
 ‘ mariage, justifiait de la dissolution de son précédent mariage, et ne se trouvait  
 ‘ pas dans le cas de prohibition de l’Art : 147 du Code Napoléon :

\* \* \* \* \*

‘ Par ces motifs, la Cour casse et annule l’arrêt de la Cour Impériale de Paris  
 ‘ du 4 Juillet, 1859 ; et remet les parties en même état qu’avant le dit arrêt ; ’

\* \* \* \* \*

From this judgment we see that in France marriage being essentially a civil contract, the *lex loci contractus* and not the *lex domicilii* governs the French courts whenever any question relative to the marriage contract comes before them.

## LUNACY.

## Chapter X.

Questions  
of status  
involved.

The subject of lunacy raises two distinct questions of status, that of the lunatic himself, and that of his guardian, committee, or curator. With regard to the status of the lunatic himself, there can be very little doubt, although the reports do not furnish any cases in support of the proposition, that a foreign finding in lunacy would be followed so far as the individual's incapacity to contract is concerned.

But the authorities are unanimous in holding as a general proposition that an English court will recognise the validity of a finding in lunacy by a competent foreign court, both as to the vesting of the lunatic's property in this country in the curator, and in allowing him to sue in this country on behalf of the lunatic's estate (*Scott v. Bentley*); this being so, the first proposition would seem to follow as a matter of course.

*Scott v.  
Bentley*  
24 L. J:  
Ch: 244.

What  
country  
entitled  
to find  
lunacy;

A question of greater difficulty arises when we come to consider what country is entitled to direct an enquiry to find whether a person is lunatic or not. A natural status such as minority depends on the *lex domicilii*; but lunacy is not a natural status; depending on a judicial proceeding, it is in reality an alteration of the natural condition of a man. In the analogous case of divorce we find the rule to be that of the matrimonial home, that is the married residence: so in the case of lunacy a general view of the statute and cases seems to point to residence being sufficient to give the court jurisdiction: but whether this is to be mere residence or usual residence it is impossible to say without more authority. The text-books are silent on the point.

Rule of  
residence.

English  
rule of  
jurisdiction.

With regard to the English rule of jurisdiction the 40th section of the Act of 1853 treats of lunatics within the jurisdiction, not limiting the section to British subjects: and the 45th section [see p. 298] treats of lunatics not within the jurisdiction, again without any limitation, but this must evidently refer to British subjects only. In an old case, *ex parte Southcot*, a commission in lunacy issued against a person beyond the sea: but his mansion and estates being in this country he must at least have been domiciled here. In many of the cases which we shall notice the lunatic has been an English subject found by inquisition abroad. The short note to *ex parte Otto Lewis* in Vezey's Reports is as follows:—

*exp:  
Southcot.*  
2 Ves: Sen:  
401.

*exp: Lewis.*  
1 Ves: Sen:  
298.

Chapter X. 'One found *non compos* before a proper jurisdiction, the Senate of Hamburg, where he resided, and a curator and guardian appointed for him and his affairs: the court was obliged to take notice of it; and the action being brought on the 4 George II. c. 10—that all persons being lunatic, or the committee of such persons, shall convey; the guardian appointed in Hamburg was ordered to Lord Hardwick to convey.' This case was approved by Lord Loughborough, C., in *ex parte Gillam*.

Foreign finding in lunacy recognised.

*exp: Gillam.*  
2 Ves: 588.  
*re Houstoun.*  
1 Russ: 312.

In *re Houstoun* however it was held that a lunatic residing in England, having property in Jamaica where he was found lunatic, must still be the subject of an enquiry in England, in order to obtain the protection of the Lord Chancellor, he having come to reside here with one of his committees. 'The commission now existing in Jamaica is no reason why a commission should not issue here. On the contrary, it is evidence of the absolute necessity that there should be somebody authorised to deal with the person and estate of the lunatic. While he is here, no court will have any authority over him or his property, unless a commission is taken out.' (Lord Eldon, C.)

But further enquiry requisite here to obtain protection of Lord Chancellor.

*re Elias.*  
3 Mac: &  
G. 234.  
*Grimwood v. Bartels.*  
25 W. R. 843.  
*Gordon v. Stair.*  
13 Shaw & D. 1073.

The result seems to be that if a *curator bonis* has been appointed by the foreign court he will be entitled to apply to the English courts to have transferred to him any money standing in the English funds, as of right (*re Elias*); but not realty, nor funds which, resulting from the sale of realty, remain realty (*Grimwood v. Bartels*). And this principle was acted upon by the Court of Session in *Gordon v. Earl of Stair*. In *re Elias* the Lord Chancellor intimated that if the lunatic were a subject of the foreign country (Holland) where he had been so found, he would have had no difficulty in at once making the order; but being an English subject, he made a preliminary order for payment of the dividends, and then directed a reference to the Master to ascertain whether the curator was entitled to the corpus of the funds by Dutch law. The Master reported that he was so entitled and that the lunatic was duly declared. The Lord Chancellor thereupon made the order, observing that he assumed that no security had been given by the curator, and that none was required by Dutch law. In *Hessing v. Sunderland* the order for transfer of the corpus was made by consent.

Foreign *curator bonis* may apply for transfer of lunatic's money. But not realty.

Case of a foreign subject.

Case of an English subject.

Reference to the Master for report.

*Hessing v. Sunderland.*  
25 L. J. Ch: 687.  
*re Stark.*  
2 Mac: &  
G. 174.

But this does not seem always to have been done: in *re Stark*, although the Master's report was in the affirmative on all the points into which enquiry was directed, the Lord Commissioner, Lord Langdale, said the granting of the order was in his discretion;

Reasons assigned in different cases for not granting transfer although Master's report favourable.

that the sum was too large for the security; that no reason had been assigned for the transfer and that he would not therefore make an order to transfer the corpus, especially as no sufficient reason was assigned for the transfer: He cited *re Morgan*, where his Lordship said the same course had been pursued by Lord Cottenham, C., and the dividends only had been ordered to be paid, because the security taken by the Court of Session was deemed insufficient for the corpus to be transferred. So in *re Sargazurietta* an order for payment of dividends only was made:—This decision was followed by Malins, V.-C., in *re Garnier*. The lunatic was a British subject, and while travelling in France became of unsound mind; he was found lunatic in France and placed in a *maison de santé* in Paris, where he had ever since resided. The learned judge said that he had no doubt that the curator who had been appointed in France, had completely vested in him the whole estate of the lunatic, and that he was entitled to sue on his behalf and to ask this court to hand out to him, as the representative of the lunatic in whom the property was vested, the money in the hands of the court. The question was however whether he was bound to hand it over simply because he was asked to hand it over, or whether he had any discretion in the matter. In the case of an English committee such a thing would not be done as a matter of course: and in the analogous case of a trustee in bankruptcy where the assets were so large as to leave a balance for the bankrupt it would not be done. Therefore in this case, when the property was vested by the French law in the curator for a specific purpose, the maintenance and well-being of the lunatic, and that being amply provided for, the application was refused.

Judge's  
discretion.

*re Morgan*.  
1 H. & T.  
212.

*re Sargazurietta*.  
20 L. T.  
O. S. 299.  
*re Garnier*.  
L. R. 13  
Eq: 532.

These cases do not in any way detract from the general theory of the recognition of the foreign appointment by the English court. In fact that theory is expressly acted upon.

16 & 17 V.  
c. 70.  
Lunacy  
Regulation  
Act.

The provisions of the Lunacy Regulation Act, 1853 (16 & 17 Vic: c. 70), with regard to lunatics out of the jurisdiction are as follow:—

#### 16 & 17 Vic: c. 70. s. 45.

s. 45.  
Where  
lunatic out of  
jurisdiction,  
inquisition to  
be before  
jury.

When the alleged lunatic is not within the jurisdiction, the enquiry shall be before a jury, and no further or other notice shall be necessary to be given to him than he would have been entitled to receive if this act had not been passed.

## Chapter X.

## s. 85.

The Master shall be at liberty without order of reference, to enquire and report whether or not any person residing out of England and Wales, and where, has been declared idiot, lunatic, or of unsound mind, and whether or not his personal estate, or some and what part thereof, has been vested in a curator or other and what person appointed for the management thereof, according to the laws of the place where the person is residing and whether or not any and what stock, portion of the capital stock, or share of any and what Company or Society, is standing in the name of or is vested in that person and what is his interest therein.

s. 85.  
Enquiry by  
the master.

## s. 141.

Where any stock, or any portion of the capital stock or any share of any Company or Society whether transferable in books or otherwise, is standing in the name of or vested in a person residing out of England and Wales, the Lord Chancellor intrusted as aforesaid, upon proof to his satisfaction that the person had been declared idiot, lunatic, or of unsound mind, and that his personal estate had been vested in a curator or other person appointed for the management thereof, according to the laws of the place where he is residing, may order some fit person to make such transfer of the stock or such portion of the capital stock or share as aforesaid or any part or parts thereof respectively, to or into the name of the curator or other person appointed as aforesaid or otherwise, and also to receive and pay over the dividends thereof, as the Lord Chancellor intrusted as aforesaid may think fit.

s. 141.  
Discretion  
of Lord  
Chancellor  
to make  
order of  
transfer.

## s. 147.

The powers and authorities given by this Act to the Lord Chancellor interested as aforesaid shall extend to all land and stock within any of the dominions, plantations and colonies of her Majesty (except Scotland and Ireland).

s. 147.  
Powers to  
extend to  
colonies.

*Newton v.  
Manning.*  
1 M. & G.  
362.

In *Newton v. Manning*, a case under the Statute 1 William IV. c. 63 (the 34th section of which was similar to section 141 given above), Lord Cottenham, C., said that he had no jurisdiction to administer the funds under the lunacy except in conformity with the laws of the country where the lunacy had been declared. If the foreign law warranted the petitioner in dealing in the manner proposed with the corpus of her husband's property, she had only to arm herself with the authority of that foreign jurisdiction and the money would be paid out to her as any other sum of money in court would be paid out to a party shewing a title. The payment of the income was ordered according to French law.

*re  
Sottomayor*  
L. R. 9 Ch:  
677.

In *re Sottomayor*, the lunatic, Portuguese by birth and domicil, and with nearly all his property in Portugal, was resident in England; a petition for enquiry was presented in England by some relations, and another in Portugal by his wife. The Portuguese court issued a request to the English courts to make an

Request by  
foreign  
court to  
make  
enquiry.



Reasons for refusal.

enquiry. The wife also applied here to have an enquiry as to Chapter X.  
the time when the lunacy commenced, it being desired by the Portuguese courts that such an enquiry should be made in England. It was held, that although it was 'a sort of duty, 'according to the Comity of Nations, for the English court to 'comply, as far as possible, with the request of the Portuguese 'court, and to endeavour to ascertain as far as possible, what that 'court wished ascertained,' yet that they would not direct such an enquiry in this case, as it was not required for any purpose of the proceedings in England, and because the finding would doubtless be taken by the Portuguese courts to have much greater weight than it would be taken to have here, and most probably to conclude other parties who could not effectually intervene in the enquiry. An enquiry was however directed, but limited to the alleged lunatic's present state of mind : having been found lunatic, liberty was given for his removal to Portugal to be delivered to his wife. (James and Mellish, LL.J.)

Decision of Scotch courts.

The Scotch courts considered the effect of a foreign finding in lunacy in *Sawyer v. Sloan*. There were two sisters both lunatics. The court appointed a curator to one of them, but declined in the case of the other, as the English Court of Chancery had already appointed a committee. That court afterwards appointed a committee for the second sister, and on his application the curator's appointment was withdrawn. *Sawyer v. Sloan.*  
Sc: Sess: ca: 4th Ser: 111. 271.

14 & 15 V. c. 81.  
Indian lunatics.

The power to remove lunatics from India, and the effect of the Indian finding are dealt with by the 'Removal from India Act, 1851' (14 & 15 Vic: c. 81).

#### 14 & 15 Vic: c. 81. s. 5.

s. 5.  
Lunatics and idiots may be removed from India by orders of the supreme courts at the several presidencies.

That in all cases where a guardian, keeper, or curator of the person and estate of any idiot, lunatic, or person of unsound mind shall have been or shall be appointed by the supreme court of judicature at any of the presidencies of India, it shall be lawful for such supreme court to declare that such person ought to be removed from India to any part of the United Kingdom, and thereupon to make such further or other order or orders authorising or directing his removal, and touching his safe custody and maintenance, as to such supreme court shall seem fit and proper; provided always, that in every such case a transcript of proceedings in the matter of the idiocy or lunacy of such person shall, under the provisions hereinafter contained, be transmitted to that part of the United Kingdom to which such person shall be removed.

#### s. 6.

s. 6.  
Transcript of

That in all cases where a guardian, keeper, or curator of the person and estate of any idiot, lunatic, or person of unsound mind shall have been or

**Chapter X.**

shall be appointed by any of the supreme courts in India as aforesaid, it shall be lawful for the proper officer of the said supreme court by the order of such court to transmit a transcript under the hand and seal of the chief justice or senior judge of such supreme court, of the proceedings by which the idiotcy, lunacy, or unsoundness of mind shall have been found, and by which such guardian, keeper, or curator shall have been appointed, to the chancery in England and the court of session in Scotland and the chancery of Ireland respectively, as the case may require, and that such transcript, when so received, shall be entered as of record in the court or courts to which the same shall be transmitted; and that in the case of any supersedeas of any such proceedings the same shall be certified and transmitted and recorded in like manner; and that the record of any such proceedings or of any such supersedeas as aforesaid shall, in case and so long and so far as the Lord Chancellor of Great Britain or other persons instructed as aforesaid, or the court of session in Scotland, or the Chancellor of Ireland instructed as aforesaid (as the case may require), shall respectively see fit, be acted upon by him and them respectively, and be of the same force and validity, and have the same force and effect, as if such proceedings or supersedeas, or proceedings or a supersedeas to the like effect had taken place in England, Scotland or Ireland respectively; and it shall be lawful for the Lord Chancellor or other persons instructed as aforesaid, the court of session in Scotland, and the Chancellor of Ireland instructed as aforesaid respectively, from time to time to make and give all such orders or directions by appointing any committee or committees, curator or curators, or otherwise, as may appear necessary or proper for securing proper care and protection to the person and estate of such idiot, lunatic, or person of unsound mind.

all inquisitions and orders to be transmitted and entered of record and to be acted upon in the United Kingdom as if the inquisitions had been taken in the United Kingdom.

## GUARDIANSHIP.

## Chapter X.

The questions of status involved.

Again we have two different forms of status, that of the protector or guardian, and that of the person protected.

Parent, the natural guardian.

Minority however is a question of natural status, and during the minority the parent is the natural guardian; therefore the simple form of guardianship is also a question of natural status. The law so far is perfectly simple: minority, and consequently parental guardianship is governed by the *lex domicilii*; domicil meaning in this case not domicil of origin, but that of permanent residence. This minority and guardianship will be recognised by the courts of all other countries, not only with reference to the capacity or incapacity to enter into contracts, but also as to the possession or custody of the infant. 'An alien father,' said Lord Campbell, C., in the *Bute case*, 'whose child had been carried away from him 'and brought to England, would undoubtedly have the child 'restored to him by writ of *habeas corpus*.'

*Ms: Bute's case.*  
9 H. L. ca: 440.

Guardian appointed by foreign court.

But on the death of the natural guardians, a successor may be appointed by decree of a foreign court, on whom the status of guardian is conferred: the question then arises what respect will be paid to this foreign appointment when the infant happens to be in this country. This again depends on the difficult point which arises in all these questions of status, what court has authority to appoint a guardian.

What court has right to appoint.

It might appear to be a consequence of what has already been said that the only court competent would be the court of the country of the domicil. But this is not the English rule on the subject.

English rule depends on residence. Extreme case.

This rule was very broadly laid down by Lord Cranworth, C., in *Hope v. Hope* to depend on simple residence in this country. The absurd case was put of an alien infant coming to England within a few weeks of attaining his majority, and who might be returning shortly to his own country. His Lordship was clear that the court would have jurisdiction, but that it might very wisely decline to exercise it. We therefore come back to the question, assuming the court to have jurisdiction, whom will it appoint as guardian?

*Hope v Hope.*  
26 L. J: Ch: 417.

The practice of paying complete respect to the appointment already made by the foreign court, although it may be said now to be established as a principle of English law, yet at times has been somewhat misunderstood. Lord Cranworth's opinion, when in

**Chapter X.** the *Marquis of Bute's case* he was discussing the decision in *Johnson v. Beattie*, was that although that case did not decide that our courts were absolutely bound to follow the foreign appointment, 'perhaps it might have been a decision more consonant with the principles of general law to have held that every country would recognise the status of guardian in the same way as it undoubtedly would recognise the status of parent, or the status of husband and wife.'

*Ms: Bute's case.*  
9 H. L. ca:  
440.  
*Johnson v. Beattie.*  
10 Cl: &  
Fin: 42.

The difficulty really is this: the status of parent is recognised, but not that of those who stand *in loco parentis*. This arises from the fact that the English court will not let go its jurisdiction over infants within its limits, and therefore reserves to itself the right to appoint the guardian of those infants: but in so doing it will follow the foreign appointment if the guardian himself be within the jurisdiction. 'I guard myself,' said Wood, V.-C., in *Nugent v. Vetzera*, 'against anything like an abdication of the jurisdiction of this court to appoint guardians. With respect to the English guardians of these children I hold that the court has power to appoint them, and I continue those that have been appointed.'

*Nugent v. Vetzera.*  
L. R. 2 Eq:  
704.

The point has arisen in the following cases:—

Review of  
the cases.

*exp: Watkins.*  
2 Ves: Sen:  
470.

*Ex parte Watkins*:—The Governor of the Leeward Islands had appointed guardians: It was argued, and the argument seems to have been assented to, that the appointment failed as soon as the infant came to England; another guardian was in fact appointed.

Lord Campbell, C., in *Johnson v. Beattie*, explained that this case really was not against the principle of the conclusiveness of the appointment, for 'we are not informed in the slightest degree what was the nature of that appointment: the infant may have been domiciled in England; or might have had property in England and nowhere else.'

*Pottinger v. Wightman.*  
3 Mer: 67.

*Pottinger v. Wightman*:—The widow was appointed guardian of the children by the Royal Court of Guernsey, and she came to England with the children: The question being what law should govern the succession, it was held that the English law was the *lex domicilii*, because the children's domicile followed the mother's, unless there were a fraudulent purpose of obtaining an advantage by altering the rule of succession. But that fraud might be presumed where no reasonable cause appeared for the removal.

*Johnson v. Beattie.*  
10 Cl: &  
Fin: 42.

*Johnson v. Beattie*:—In this case the Lords were not unanimous: the general principles involved in the decision were these: If there be a foreign child in England with guardians duly appointed in the child's own country, the Court of Chancery may, without

Principles  
involved in  
decision.

any previous enquiry whether the appointment of other guardians in England is or is not necessary, and would or would not be beneficial to the child, make an order for the appointment of English guardians. If the guardian is out of the jurisdiction, the court appoints one within ; persons residing out of the jurisdiction may be appointed guardians jointly with persons residing within. This decision was construed by the Court of Session in the Marquis of Bute's case to imply that the foreign appointment would not be recognised under any circumstances ; but in the appeal from that court to the House of Lords, all the lords concurred in holding that the case did not go to either extremity of holding that the appointment was to be absolutely followed or absolutely ignored. Lord Cranworth explained its effect to be that 'the status of guardian not being a status recognised by the law of this country unless constituted in this country, it was not a matter of course to appoint a foreign guardian to be English guardian—but that it was only a matter to be taken into consideration.' (*Stuart v. Bute.*)

*Dawson v. Jay* :—The appointment of the foreign guardian by the Surrogate of New York was ignored ; Sir John Stuart, V.-C., was impressed by the fact that even in America the effect of the appointment was limited to the State of New York in which it was pronounced ; but the case has been thus explained :—'The infant came to England with the entire concurrence of the guardian originally appointed by the Supreme Court of New York, who continued guardian at the time of the removal : It was another guardian, afterwards appointed with doubtful regularity, who wished to get possession of the infant and carry her back to America.' (Lord Campbell, C., *Stuart v. Bute.*) It has also been explained by Wood, V.-C., to have proceeded on the ground that the child turned out to be a British subject, and that there was no authority to send a British subject out of the realm.

*The Marquis of Bute's case (Stuart v. Bute, Stuart v. Moore)* :—In this important case nearly all the authorities were reviewed and explained, especially *Johnson v. Beattie*. The Lords were unanimous in acknowledging the foreign guardian. Lord Campbell, C., said :—'I believe that the same remedy which would be afforded to an alien father whose child had been carried away from him, could be afforded to a foreign guardian standing in loco parentis on the ravishment of his ward.'

*Nugent v. Vetzera* :—'I think,' said Wood, V.-C., 'having regard to the principles of International Law, and the course that all

*Dawson v. Jay.*  
3 De G. M. & G. 764.

*Ms: Bute's case.*  
9 H. L. ca: 440.  
*Johnson v. Beattie.*  
10 Cl: & Fin: 42.

*Nugent v. Vetzera.*  
L. R. 2 Eq: 704.



**Chapter X.** 'courts have taken of recognising the proceedings in other countries of regularly constituted tribunals, provided these other countries be civilised communities, especially if they are communities with which we are in amicable connexion, as we are with the Empire of Austria, it is impossible for me to disregard the appointment by an Austrian court of this guardian to these children, who are Austrian subjects, children of an Austrian father, merely because this guardian has continued the course which those who preceded him in that office adopted—sending their wards for a certain time over here for education in this country.'

The children being in this country an appointment was necessary, but the Austrian appointment was followed.

*Savini v. Lousada*,  
W. N. 1870,  
p. 60.

*Savini v. Lousada, re Savini*:—a council of tutorship and guardians of an Italian child had been appointed in Italy: an English order appointing other guardians was discharged. Vice-Chancellor James said he was 'bound to recognise and respect the rights and authority of the foreign guardians and the foreign court by which they were appointed, exactly as he should expect the foreign court to respect his authority if the position of the parties was reversed.' There does not however seem to have been an English appointment of the foreign guardians.

It would seem however that on very special grounds the English courts will act against the foreign guardians; as for instance, neglect or abandonment of the children; or danger to their property. But the fact that they have been sent to England for their education, or for some other temporary purpose is no evidence of abandonment.

Grounds for not following foreign appointment.

We have here a very practical illustration of the doctrine of the auxiliary sanction:—

The guardian, possessed of rights given to him by a foreign court, in virtue of the office with which it has vested him, is clothed by the English courts with an auxiliary office or guardianship, by which he is enabled to exercise those rights in this country.

Guardianship a practical illustration of the auxiliary sanction.

The question of guardianship, which is of course that of a minor's incapacity or disqualification, has been limited by Story to a guardianship arising from the law of nature. 'Personal disqualifications,' he says, 'not arising from the law of nature, but from the principles of a customary or positive law of a foreign country, and especially such as are of a penal nature, are not generally regarded in other countries where the like disqualifications do not exist.' [Conflict of Laws, § 104. (4).]

Story, § 104 (4).

Case of a  
French  
prodigal  
does not fall  
within rule:  
it is part of  
*lex fori*.

This principle was acted on by Fry, J., in *Worms v. De Valdor*, Chapter X. where a French prodigal was allowed to sue in this country ——— without his *conseil judiciaire*. In other words there is no change of status implied in the requirement of a foreign law that a person should not be allowed to act without assistance, even though a name is used which somewhat resembles those names applied to conditions to which a status is attached. This case falls more properly under the chapter on the rule 'Lex fori' [chapter vi.].

See however the decision of the French courts in *re Drake del Castello*. [post p. 453.]

*Worms v.  
De Valdor.*  
49 L. J.  
Ch: 261.

*re del  
Castello.*  
J. D. I. P.  
1883, p. 51.

## Chapter X.

## PROBATE AND ADMINISTRATION.

The question of status involved in the grant of probate or letters of administration is mainly that of the executor or administrator ; but the rules which govern their appointment depend on a previous question which, although it may seem a somewhat inappropriate use of the term, must for the sake of convenience be called the status of the deceased ; that is whether he died testate or intestate ; and this status is of course only to be determined as at the instant of death.

Questions of status involved.

We proceed to consider wills of personalty.

We have first to examine the rule by which testacy or intestacy is to be ascertained : secondly, the law which governs the appointment of executor or administrator, or grant of probate or administration : thirdly, if intestacy is ascertained, the law regulating succession.

Now testacy depends on three things ; the capacity to make a will ; the fact of making a will ; the validity of the will when made : And as to all three the broad rule may be taken to be, as

Testacy depends on three things.

*Maltass v. Maltass.*  
1 Rob:  
Eccl: 67.

laid down in *Maltass v. Maltass* and a host of other cases, that the question of testacy or intestacy is governed by the law of the domicile of the deceased ; and this is now the accepted interpretation of the maxim *mobilia sequuntur personam*, which was formerly interpreted to apply to residence rather than to domicile, as in *Pipon v. Pipon* and *Burn v. Cole*.

*Lex domicilii.*

*Pipon v. Pipon*  
1 Ambl: 25.  
*Burn v. Cole.*  
1 Ambl: 415.

The capacity to make a will must clearly involve the same question as the capacity to do any other act, to enter into a contract, to marry ; if a person, a minor by the law of his domicile, or a married woman by the law of her husband's domicile, is incapacitated from making a will, any will made by such a person must be invalid in all other countries : if on the other hand there is no incapacity by that law, the will must be held valid even in a country where such incapacities are recognised.

Capacity to make a will.

The fact of making a will most frequently raises the question whether certain papers left by the deceased are testamentary or not : or, as in *the goods of Gutierrez*, whether what purports to be, is in fact the will of the deceased. In that case a domiciled Spaniard on the day of his death caused a document to be pre-

Question whether papers are testamentary.

*goods of Gutierrez.*  
38 L. J:  
P. & M. 48.

pared by a notary purporting to give authority to his wife to make a will on his behalf: she made a will after his decease and appointed herself executrix: the will was valid by Spanish law and was therefore admitted to probate. Here again the law of the domicile must determine the question. Chapter X.

Validity of will as to forms.

And similarly as to the validity of the will with regard to the forms and solemnities in the making of it: the general proposition that a will is to be made in accordance with the law of the domicile of the testator, and not according to the law of his place of residence was laid down in *Stanley v. Bernes*, *Croker v. Hertford* (on appeal from the case *sub nom: De Zichy v. Hertford*) and *Bremer v. Freeman*. So in *Collier v. Rivaz*, where an Englishman domiciled in Belgium, who however had previously been domiciled in this country, left certain testamentary papers which were not executed according to the forms required by Belgian law. But that law, under the particular circumstances of the case, would have determined the validity of the instruments according to the law of the testator's own country. The execution having been in due form according to English law the court pronounced in favour

*Stanley v. Bernes*.  
3 Hagg.  
Eccel. 373.  
*Croker v. Hertford*.  
4 Mo.  
P. C. C. 339.  
*De Zichy v. Hertford*.  
3 Curt. 468.  
*Bremer v. Freeman*.  
10 Mo.  
P. C. C. 306.  
*Collier v. Rivaz*.  
2 Curt. 855.

French rule.

of the will. The law of France makes an exception to this rule: a will made by a domiciled Frenchman during the most temporary residence in a foreign country, would be valid if executed according to the law of that country (*Crookenden v. Fuller*). And with regard to the wills of personalty made by British subjects out of the United Kingdom, their validity is now governed by Lord Kingdown's Act (24 & 25 Vic. c. 114) which provides that whatever be the domicile of the testator either at the time of making the will or at the time of death, the will shall be held to be well executed for the purpose of probate or confirmation, if made 'according to the forms required either by the law of the 'place where the will was made, or by the law of the place where 'the person was domiciled when the will was made, or by the 'laws then in force in that part of Her Majesty's dominions where 'he had his domicile of origin.' Section 3 also provides that a change of domicile shall not invalidate nor alter the construction of such a will (*cf: in the goods of Reid*).

*Crookenden v. Fuller*.  
1 S. & T.  
441.

British wills of personalty made out of U.K.

Act only applies to British subjects.

This act does not apply to any other wills than those of British subjects; therefore a will of a foreigner executed abroad according to the formalities required by English law is invalid. (*in the goods of Von Buseck*.)

*goods of Reid*.  
L. R. 1  
P. & M. 74.

Some doubt has been thrown on the exception, made by the decision of the Privy Council in *Tatnall v. Hankey*, to this rule of

*goods of Buseck*.  
6 P. D. 211.  
*Tatnall v. Hankey*.  
2 Mo.  
P. C. C. 342.

**Chapter X.** the domicil, in the case of a will made in pursuance of a power of appointment.

Again, the law of the domicil governs the construction of the will. In *Anstruther v. Chalmers* a Scotchman domiciled in England executed a will in Scotland in Scotch form. There was a gift of personalty to a person who had died during the life of the testator. By Scotch law the gift would not have lapsed, but by English law it did, and the next of kin were therefore held entitled.

The validity or invalidity of the will being thus determined, it follows that probate or administration will be granted to the person who would be entitled to it by the law of the domicil : Probate granted according to *lex domicilii*.

*goods of Cringan.*  
1 Hagg:  
Ecc: 548.

*goods of Maraver.*  
1 Hagg:  
Ecc: 498.  
*goods of Stewart.*  
1 Curt:  
Ecc: 904.  
*goods of Bianchi.*  
1 S. & T.  
511.

*goods of Oliphant.*  
30 L. J.  
P. & M. 82.

*in the goods of Cringan* the testator died domiciled in Scotland and by his will directed the legatees to appoint two persons to execute his testamentary bequests: probate was granted to the nominees: *in the goods of Maraver* probate of a will of a married woman, native and domiciled in Spain, was granted according to the law of Spain to one of her sons: and similarly *in the goods of Stewart*: and *in the goods of Bianchi*, where the Judge of Orphans had appointed a guardian of children domiciled in Brazil, who appointed the Brazilian minister at Turin his attorney with power of substitution: letters of request were issued to the judicial authorities in England to collect and deliver the personalty in this country to the minister or his representative: administration was granted to the representative.

Where no executor has been appointed in the will the practice, as established *in the goods of Oliphant*, is to grant probate if the grant is to an universal heir, and administration with the will annexed if it is to an universal legatee.

The question however has still to be determined to what period does this rule *lex domicilii* relate; to the time of making the will, or to the time of death? It must evidently be the domicil at the time of death, because if there is a will, it only comes into actual existence at that time; if there is no will, the maxim as to movables following the person's domicil points also to that time. This is quite clear as to the fact of there being a will, as to the appointment of the person to distribute the estate, and also as to its validity in point of forms and ceremonies; the practical result of the rule being that if the domicil is changed, and a will has been made under the old law, and that law does not correspond with the new law, another will must be made to avoid intestacy; except of course under Lord Kingdown's Act.

To what period *lex domicilii* relates.

If domicil is changed a fresh will must be made.

But with regard to the capacity to make the will, the rule is



Story.  
§ 465.

stated by Story to be that of the domicile at the time of making the will [Conflict of Laws, § 465]. The reason for this, although the learned author does not state as much, seems to be that even by domestic law, a will made during any personal disability is not rendered valid by the fact of the testator having outlived such disability, unless its removal were followed by some act of confirmation or adoption amounting in law (in the case of a foreign will this law being that of the actual domicile) to execution [cf. Jarman on Willis, 4th ed: I. p. 41].

Chapter X.

Foreign  
decisions  
on these  
matters.

But the determination of these questions may be simplified by a decision of the courts of the domicile as to testacy or intestacy: they may have decided that the testator was incapable of making a will: they may have decided that certain papers are by that law to be considered testamentary; as in *Larpent v. Sindry*, where two papers having been considered as a will and a codicil by the court in India, the court of the domicile, the grant was followed although in this country they would have been proved as together containing the will of the deceased: they may have decided that the necessary forms and solemnities required by their law have been complied with, and that therefore the will is valid; as in *the goods of Read* and *Moore v. Darrell*. Or they may have determined on the right of a certain person to the inheritance, as in *Dogliani v. Crispin*. In all these cases there is no exception to the broad rule that the foreign decision will be accepted as final. Lastly they may have granted probate, the deceased being testate; or they may have declared him intestate, and have granted administration to persons properly qualified according to that law. It is with regard to the latter decisions that the most important questions arise.

*Larpent v. Sindry*.  
1 Hagg:  
Eccl: 383.

Accepted  
as final.

*goods of Read*.  
1 Hagg:  
Eccl: 474.  
*Moore v. Darrell*.  
4 Hagg:  
Eccl: 343.  
*Dogliani v. Crispin*.  
L. R. 1  
E. & L. 301.

The foreign  
executor  
will not be  
recognised  
in England

The practical form which the first question takes is this: when the testator has personal property in England, is the status of the executor or administrator already appointed by the foreign court to be recognised in this country, or must a fresh grant be made here; and will this grant if made follow the foreign grant? As in the cases of the curator of a lunatic, and the guardian of a minor, so in this case; the status is so far not recognised as that it will be held to be strictly confined to the territorial limits of the country within which the grant was made: a foreign executor or administrator will not be allowed to touch, for the purposes of administering the estate, personal property in this country without a grant from the English Court of Probate. An estate must be

**Chapter X.** administered in the country in which possession is taken of it without an English grant.  
under lawful authority from that state, for foreign courts have no power to appoint persons to administer personalty in England.

(*Preston v. Lord Melville*; *Tourton v. Flower*.) But as in the case of lunacy and guardianship, the rule may be broadly laid down that the status will be recognised as existing in the foreign country, and the person appointed there will be clothed with an auxiliary status by the English courts to enable him to deal with the property here. And the reason for this rule may be found in the fact that the administrator, as indeed also the executor curator and guardian, are strictly speaking officers appointed, or whose appointments are sanctioned, by the court; such appointments therefore may be said to be intimately connected with the procedure of the court, and the law which governs procedure is as we have seen in all cases the *lex fori* [*cf.* chapter vi.]. We have here therefore another very practical illustration of the theory of the auxiliary sanction. [*cf.* Sir C. Cresswell in *Laneville v. Anderson* :—‘In granting probate here of a foreign will, the court ‘is auxiliary to the courts of the testator’s country;’ and Lord Westbury in *Enohin v. Wylie* :—quoted *post* p. 317].

But his status will be recognised as existing abroad.

In the earlier cases there appears to have been a slight hesitation on the part of the courts as to whether they were bound ‘in all cases, and under all circumstances, to follow the grant of ‘probate made by a court of competent jurisdiction.’

This doubt was expressed in *Larpent v. Sindry*, in the goods of *Read*, and in *Viesca v. D’Aramburu*. In these cases however the foreign probate was followed: in the last Sir Herbert Jenner said that he did not know whether the decree of the court of Cadiz were binding on the Prerogative Court of Canterbury: but that if it were discretionary, he would follow it for its convenience.

In the goods of *Cringan*, Dr. Lushington expressed his opinion that if the foreign court had decreed probate he would have had nothing to do but to follow the grant.

In the goods of *Rogerson* administration had been granted to the brother of the deceased by the Commissary Court at Dumfries: the grant was followed, although the English court would have hesitated between a grant to the brother or the widow.

In the goods of *Earl* the whole subject was reviewed by Sir J. P. Wylde :—‘The result of the cases’ he says, ‘is that in the old ‘Prerogative Court the tendency was to follow the foreign grant ‘where it could be done, but there was a reluctance to lay down

Review of the subject by Sir J. P. Wylde.

*Preston v. Melville*,  
3 Cl. & F. 1.  
*Tourton v. Flower*,  
3 P. Wms.  
369.

*Laneville v. Anderson*,  
30 L. J.  
P. & M. 25  
*Enohin v. Wylie*,  
31 L. J.  
Ch. 402.

*Larpent v. Sindry*,  
1 Hagg.  
Eccl. 383.  
goods of  
*Read*,  
1 Hagg.  
Eccl. 474.  
*Viesca v. D’Aramburu*,  
2 Curt.  
Eccl. 277.

goods of  
*Cringan*,  
1 Hagg.  
Eccl. 548.

goods of  
*Rogerson*,  
2 Curt.  
Eccl. 656.

goods of  
*Earl*,  
L. R. 1 P. &  
D. 450.

‘any absolute rule in the matter, while the decisions in the Court Chapter X.  
 ‘of Probate have militated against the rule of following the foreign  
 ‘grant.’ The only case cited in support of this statement so far  
 as it relates to the Probate Court was that of the Duchess of  
 Orleans. It is very doubtful however whether the court either in  
 that case which we shall examine shortly, or in any other has ever  
 directly negated the doctrine.

The question really is, continued the learned Judge, ‘in what  
 ‘way ought the court to act upon it?’

Powers of  
 Probate  
 Court under  
 20 & 21 V.  
 c. 77 s. 73.

‘There was no power in the old Ecclesiastical Courts to make  
 ‘a grant except in the direction indicated by the practice of those  
 ‘courts. The Court of Probate however is armed with a special  
 ‘power by the 73rd section of 20 and 21 Vic: c. 77.’

*20 & 21 Vic: c. 77. s. 73.*

Where a person has died or shall die wholly intestate as to his personal  
 estate, but without having appointed an executor thereof willing and  
 competent to take probate, or where the executor shall at the time of the  
 death of such person be resident out of the United Kingdom of Great Britain  
 and Ireland, and it shall appear to the court to be necessary or convenient in  
 any such case, by reason of the insolvency of the estate of the deceased, or  
 other special circumstances, to appoint some person to be administrator of  
 the personal estate of the deceased, or of any part of such personal estate,  
 other than the person who if this Act had not been passed would by law have  
 been entitled to a grant of administration of such personal estate, it shall not  
 be obligatory on the court to grant administration of such deceased person  
 to the person who, if this Act had not passed, would by law have been  
 entitled to a grant thereof, but it shall be lawful for the court in its discretion  
 to appoint such person as the court shall think fit to be such administrator  
 upon his giving such security (if any) as the court shall direct, and every  
 such administration may be limited as the court shall think fit.

The grant  
 under s. 73.

‘I think the court ought to act upon that section, and to make a  
 ‘grant in all such cases as the present to the person who has been  
 ‘clothed by the court of the country of domicile with the power and  
 ‘duty of administering the estate, no matter who he is, or on what  
 ‘ground he has been clothed with that power.’ ‘The grant under  
 ‘the 73rd section will describe him as a person having that  
 ‘power, and thus the difficulty will be avoided by declaring that a  
 ‘person is executor who according to the practice of the court is  
 ‘not executor, and of continuing a chain of executorship by  
 ‘persons who are executors according to the law of a foreign  
 ‘country, but not according to the law of this country.’

‘It is one thing to make a grant of administration, and another  
 ‘to make a grant of probate to a person as executor, which  
 ‘involves many peculiar consequences. I shall make the grant

**Chapter X.** 'with the will annexed to the applicant under the 73rd section,  
 'as the person entitled under the grant of the court of the country  
 'of the deceased's domicile to administer the estate.'

*goods of  
 Smith.*  
 16 W. R.  
 1130.

*In the goods of Smith*, the same learned Judge said :—' It is a  
 'general rule on which I have already acted, that where a person  
 'dies domiciled in a foreign country, and the court of that country  
 'invests anybody, no matter whom, with the right to administer  
 'the estate, this court ought to follow the grant simply because it  
 'is the grant of a foreign court, without investigating the grounds  
 'on which it was made, and without reference to the principles on  
 'which grants are made in this country.' The grant was made as  
 before under section 73.

*goods of  
 Hill.*  
 L. R. 2  
 P. & D. 89.

And again *in the goods of Hill*, when Lord Penzance, he acted  
 on the same principle of acknowledging the fact of the foreign  
 grant as the basis of his proceeding, by making the grant to the  
 same person in this country.

*Miller v.  
 James.*  
 L. R. 3  
 P. & D. 4.

One of the most recent expositions on the subject was given by  
 Sir James Hannen in *Miller v. James*, the question arising how-  
 ever on a motion to strike out certain pleas. The executor pro-  
 pounded a will alleging that the deceased died domiciled in  
 Jersey, and that probate had been granted by a competent court  
 in Jersey. The next of kin pleaded undue execution, incapacity,  
 and undue influence. The learned Judge said :—' It is the estab-  
 'lished practice that where a will has been proved in a foreign  
 'court, a duly authenticated copy will be admitted to probate in  
 'this country without further evidence of the validity of the will,  
 'as it is presumed that the foreign court has been satisfied on that  
 'point. It was said in argument that the validity of this will  
 'might be put in issue because it had been proved only in Common  
 'Form in Jersey. But it is to be borne in mind that the expres-  
 'sions in Common Form and in Solemn Form are not necessarily  
 'appropriate to foreign probates, and the court here is not entitled  
 'to take upon itself to determine whether the court of the place  
 'of the domicile has adopted sufficient means to investigate the  
 'validity of wills to which it has given its official sanction. For  
 'these reasons I am of opinion that the pleas objected to must be  
 'struck out, and the defendants must seek their remedy by appli-  
 'cation to the proper court, whatever that may be, having  
 'jurisdiction to revoke the probate which has been granted.'

Considera-  
 tion of the  
 subject by  
*Sir J.  
 Hannen.*

General  
 application  
 of the theory  
 of the con-  
 clusiveness  
 of foreign  
 probate.

*goods of  
 Read.*  
 1 Hagg;  
 Eccl: 474.

The same question was raised *in the goods of Read*, where it was  
 laid down that the English court must presume that the court of  
 competent jurisdiction abroad acted properly in granting probate

of the paper as a valid instrument, and had evidence before it **Chapter X.**  
accounting for the want of execution and other imperfections.

Principles  
deduced  
from the  
cases.

The principles to be deduced from these cases are ; first, so far as the suit abroad and judgment are concerned, they will be subject in all respects, as to the defences which may be raised, to the general rules applicable to foreign judgments ; secondly, the foreign grant will be followed, and power will be granted to the foreign executor or administrator to administer the English assets. But a further question arises, in what form will the power be granted? We have seen that although an English original grant might perhaps not have been made to the person to whom the foreign grant has been made, yet the auxiliary grant will be made.

Application  
of rule  
*lex fori*

The person is entitled to some power, but being now constituted an officer of the English court, and his power to administer the assets in this country being derived from that court, the rule *lex fori* will apply and his power will be limited according to English law.

This is the difficulty to which Sir J. P. Wylde referred when he said that the solution of it was supplied by the 73rd section. The Indian grant *in the goods of Read*, had been of probate to the widow as universal legatee and constructive executrix of an informal paper, in which character no security was required : the English grant was of administration with the will annexed to her as relict and principal legatee, and security was required. So *in the goods of Mackenzie*, in which the last case was followed : the grant was limited to the goods here, and the character of the representative was varied so as to make the proceedings conform to the law of England. And again *in the goods of Cosnahan*, the grant of the Ecclesiastical Court in the Isle of Man was followed so far as to treat the deed as testamentary, but not so far as to treat a trustee who had been appointed executor according to the tenor in the same capacity in this country : administration with the will annexed was granted as before under the 73rd section. The grant of course is always limited to the goods in this country.

*goods of  
Mackenzie.  
Deane 17.*

*goods of  
Cosnahan.  
L. R. 1  
P. & D. 183.*

The rule therefore may be thus stated, the English grant will be of probate or of some form of administration in accordance with English law, the person to whom it is made being designated by the foreign court.

*Duchess of  
Orleans'  
case.*

This brings us to the very important decision *in the goods of H.R.H. the Duchess of Orleans*.

*goods of  
Orleans.  
1 S. & T.  
253.*

In the first place, the general principle was recognised that the Probate Court, in granting administration of the effects of a



**Chapter X.** person who died domiciled abroad, generally follows the law of the domicile; and usually also any decree pronounced by the *forum domicilii* in accordance with that law. But the foreign administration had been granted to a minor: Sir Cresswell Cresswell said:—‘Is there any instance of the courts of this country, whilst following the law of the domicile, doing something contrary to their own law: *e.g.*, as is now asked, granting administration to a minor, who cannot take upon himself the liabilities which the English law casts on administrators?’

Foreign administration granted to minor.

The principle *apparently* deducible from this case is therefore, that the foreign probate will not be followed in cases where the English courts would, by granting an English probate, be proceeding contrary to English law, and this is the marginal note in the reports; it will also be remembered that Sir J. P. Wylde considered the decision to be an instance of the unwillingness of the Probate Court to adopt the foreign grant. The case is really however confirmatory of the rule just given and in fact slightly extends it.

Principle apparently deducible from the case.

First, if English administration had been granted to the minor—the Comte de Paris—it would have been comparatively useless; for, leaving out of the question the English law against the appointment of minors as administrators, he could not have bound himself by deed, had it been necessary.

The case considered.

Secondly, what happened was merely a suspension of the grant to the count until he should attain his majority. According to the practice (that is of course the English practice), the only person whom a minor is entitled to elect is his next of kin. The Queen Dowager, his grandmother, was therefore the proper person for the court to elect to be his guardian for the purpose of taking administration on his behalf. This course was afterwards taken, and Sir Cresswell Cresswell had no hesitation in granting administration to her.

The real difficulty in the case is that the Comte de Paris was an emancipated minor. If, as we have said, the true rule is that majority is governed by the law of the domicile, it is difficult to see why the status of an emancipated minor is not also to be universally recognised: this decision seems to limit, whether rightly or not we do not venture to say, the rule to actual minority and majority.

Emancipated minor.

The case seems also to conflict in all points with the decision in the goods of the Countess Da Cunha. The will in that case had been established in Portugal, and a judge administrator appointed: the residuary legatee was a minor, but on her marriage

Another instance of minor.

goods of  
Da Cunha.  
1 Hagg.  
Eccle: 237.

her disabilities ceased, and the appointment was revoked; her husband was also a minor, but being married and holding a commission in the army, was by Portuguese law considered of full age, and legally authorised to do all acts as if of age. The property in England was money in consols, and the wife was entitled under her dotal contract to dividends only during her life: administration with the will annexed was granted to the wife, limited to the receipt of the dividends: the reason given for the grant was however, because 'no possible inconvenience could arise.'

Chapter X.

Need not  
have been  
technical  
grant of  
probate.

The nature of the proceedings abroad is perfectly immaterial: it is not essential that there should have been a technical grant of probate or administration. Thus *in the goods of Dost Aly Khan*, <sup>*goods of Dost Aly.*</sup> the will was validly executed according to Persian law: and had <sup>6 P. D. 6.</sup> been, together with all the property, taken possession of by the Persian court having exclusive jurisdiction in matters of wills. This court had apportioned the property and had appointed to one of the sons money in the English funds, giving him a document under the hand and seal of the Judge. Neither the will nor a copy of it was allowed to be taken out of the court; but the document was proved to be sufficient in Persia to entitle the person to whom it was given to take all proceedings necessary to get possession of the property mentioned in it, and being properly verified, administration was granted limited to the property referred to. And in an earlier case, *in the goods of Deshais*, in which a <sup>*goods of Deshais.*</sup> notarial certificate of the will having been accepted as valid by <sup>4 S. & T. 13.</sup> a foreign court, was rejected; Sir J. P. Wylde said:—'Show me 'any document that purports on the face of it to be equivalent to 'probate, any act of the foreign court the language of which 'conveys to my mind in any shape or form that the foreign court 'has adopted the document as a will, that will be sufficient. We 'do not require that the form of approval should be the same as 'our grant of probate. But a notarial certificate is nothing.' But in *Price v. Dewhurst* the foreign grant was not followed. A <sup>*Price v. Dewhurst.*</sup> husband and his wife were domiciled in England, but resided in <sup>8 Sim. 279.</sup> Denmark. They made a joint will according to Danish law; but afterwards they both made sole wills: these were proved here, but probate of the joint will had already been obtained in the Executor's Court of Dealing in St. Croix. The decision of this court was ignored on the ground of interest of the judges [*cf.* p. 117 ante].

Notarial  
certificate.

Case where  
the grant  
was not  
followed.

**Chapter X.** If the proceedings abroad are only in progress, the English court will suspend the suit here to wait for the decision of the court of the domicile, which it will afterwards follow. (*Hare v. Nasmyth*; *De Bonneval v. De Bonneval*.)

*Hare v. Nasmyth.*  
2 Add: 25.  
*De Bonneval v. De Bonneval.*  
1 Curt: Eccl: 856.

If proceedings in progress abroad suit will be suspended.

This doctrine has been carried further. If administration has already been granted in England to the person presumed to be entitled by the law of the domicile, and of course limited to the property in England, and afterwards administration is granted by a court of that domicile, the English grant should be revoked, and a new grant made to the foreign administrator: Lord Westbury, C., in *Enohin v. Wylie*, treated this as the direct consequence of the rule of the domicile: after enunciating the different bearings of that rule, he said, 'therefore, when the Probate Court was satisfied that the testator died domiciled in Russia, and that his will containing a general appointment of executors had been (as it was) duly authenticated by those executors in the proper court in Russia, it was the duty of the Probate Court in this country at once to have revoked the former letters of administration which had been granted, and to have clothed the Russian executors with ancillary letters of probate to have enabled them to get possession of that personalty which in fact though not in law was locally situate in England. The utmost confusion must arise, if, where a testator dies domiciled in one country, the courts of every other country in which he has personal property should assume the right, first, of declaring who is the personal representative, and next, of interpreting the will and distributing the personal estate situate within its jurisdiction according to that interpretation. There might be as many different personal representatives of the deceased, and as many varying interpretations of his will, as there are countries in which he is possessed of personal property. It was to prevent the evils that would result from this conflict of jurisdiction that the law of the domicile was introduced and adopted by civilised nations.'

Revocation of English grant on subsequent foreign grant.

*Enohin v. Wylie.*  
31 L. J: Ch: 402.

A somewhat similar point arose in the *goods of Bianchi*: a Sardinian settled in Brazil; he died intestate on a voyage from Bahia to Genoa to resume his domicile there. The courts of Turin and Brazil had arranged that the Italian Government should have administration and guardianship. The English court revoked a grant of administration which had been made to the representative of the person entitled to it by Brazilian law [ante p. 309] and made a grant to the person entitled by Italian law.

*Lynch v. Paraguay Gov.*  
L. R. 2  
P. & D. 268.

But in *Lynch v. Provisional Government of Paraguay* this Penal decree ignored.

[cf.  
chapter vii.]

principle was not acted on ; a decree subsequent to the testator's death declaring his property to belong to the nation of Paraguay was ignored on the ground that it was a penal decree : the probate was granted according to the general rule *lex domicilii* at the time of death, the court intimating that the Provisional Government itself must enforce the decree against the executor. Chapter X.

Nature of  
auxiliary  
grant  
governed by  
*lex fori*.  
But foreign  
limitations  
will be  
incorporated.

We have seen that the person who is entitled by the foreign law, or who has been appointed by the foreign court, will be entitled to some grant in England, but that the nature of the grant depends on the *lex fori*. This rule is subject to another modification. Any limitation of the power or of the appointment imposed either by the law of the domicile or of the court of the domicile, will be incorporated in the auxiliary appointment by the *lex fori*. Thus in *the goods of Steigerwald*, administration was granted to a provisional executor, but limited for such a time as the appointment by the proper court of the domicile remained unrescinded and in force. So in *Laneville v. Anderson* a decree of a French court that the right of the executor appointed by the will had expired, and that the administration of the estate had devolved on the representatives, was followed, the English court granting administration with the will annexed to the representatives. And in *Viesca v. D'Aramburu*, where a Spaniard died domiciled in Spain, possessing funds in England. Pending a suit in the court at Cadiz as to the validity of one of two wills a judicial administrator was appointed with power to pay to certain people a moiety to which they should be entitled in any event, the other moiety to remain in deposit. Rogatory letters were directed to the court in England to enable the administrator to receive the funds here : administration was granted in the terms of the request : that is, it was limited in the same manner as the Spanish grant. In like manner limitations imposed by the testator will be followed : as in *the goods of Winter*, where different executors had been appointed for English and foreign property : the grant was made in accordance with the terms of the appointment.

*goods of*  
*Steigerwald*.  
10 Jur. 159.

*Laneville*  
*v. Anderson*.  
30 L. J.  
P. & M. 25.

*Viesca v.*  
*D'Aram-*  
*buru*.  
2 Curt.  
Eccl. 277.

*goods of*  
*Winter*.  
30 L. J.  
P. & M. 56.

Probate of  
codicils.

If a will has been proved abroad, probate of the codicils must be granted by the foreign court (*in the goods of Miller*) ; this case presumably proceeds on the same principles as *Pechell v. Hilderley*, where a will was bad by both Italian and English law, but a codicil was good by Italian law, and being good would by English law have validated the will : the court refused to mix up the laws of two countries, lest the result should be conformable to neither.

*goods of*  
*Miller*. 67.  
8 P. D. 1  
*Pechell v.*  
*Hilderley*.  
L. R. 1  
P. & M. 673.

**Chapter X.** It will be convenient now to consider the practical question of translations of foreign wills.

The general rule is that the translation is made after the will has been brought into the registry, probate or administration being granted on the translation. But where the original will is in English and a translation of it has been proved abroad, Sir J. P. Wylde said *in the goods of De Vigny*, that there were two methods of obtaining the English probate: Prove the original will valid by the law of the domicile: then the original will and not the foreign translation will receive probate here: or, prove the foreign probate of the translation, and administration will be granted here with re-translation of the will annexed. It must be confessed however that the second seems the better method, as being more consonant with the idea of the auxiliary probate: it was the course adopted by the court *in the goods of Rule*, where a Spanish translation of a will written in English had been proved before the proper court in Mexico: the English grant was on a re-translation, and not on a certified copy of the original. The doctrine on which this rule depends was thus laid down *in the goods of Petty*:—The only document on which the English court can act is the document which was before the foreign court, and that must be re-translated after it has been brought into the registry here. In that case the court was asked to act on a translation of the document admitted to probate by the Brazilian courts, the documents being certified by the British vice-consul.

Translations.

Two methods of obtaining probate.

Re-translations.

An apparent exception to this rule was made *in the goods of Clarke*. The probate granted at Archangel consisted of the original will, a Russian translation, and other official documents. The court was moved to allow probate to issue on a certified copy of the will. Sir J. P. Wylde said, ‘If the executor had produced a copy of the document at Archangel, that is to say a copy of a copy, he would have had probate without difficulty: but he brings the original will; there is a valid objection to leaving the original will in the registry because it forms part of the probate, and he asks to leave a certified copy of the will and of the probate attached to it.’ The motion was granted.

The foreign administrator, clothed with the auxiliary English grant, is of course entitled to sue creditors to the estate who are in England: possibly he might obtain leave to serve writs out of the jurisdiction under Order XI: but the question arises whether a foreign administrator may sue in England without applying for

Right to sue.

*goods of De Vigny.*  
4 S. & T. 15.

*goods of Rule.*  
4 P. D. 76.

*goods of Petty.*  
41 L. T. 529.

*goods of Clarke.*  
36 L. J.  
P. & M. 72.



Probate  
necessary to  
reduce assets  
into  
possession.

probate here. It is clear that to reduce any other assets into possession, probate is necessary : thus in *re Fernandez' Executors* a

Chapter X.

creditor of an English company which was being wound up in England, died domiciled in India, from which country assets of the company were remitted to the official liquidator. The debt had been proved, and a dividend paid before the creditor's decease.

*re Fernandez' Exors.*  
L. R. 5  
Ch: 314.

It was held that the final dividend could not be paid to the executors on the Indian probate; but that they must take out probate in this country. So in *re Vallance*, a donee, under a will, of a special power of appointment by will over proceeds of lease-

*re Vallance.*  
24 Ch: D.  
177.

holds in England, died in New Zealand having duly exercised such power by his will which was made and duly proved in the colony. The fund being in court the appointee filed a petition for payment out: Pearson, J., held that the foreign probate was insufficient, and that an English probate must be produced. But

such probate being granted, it would be the duty of the Court of Chancery to hand over any funds under its control (Lord West-

*Enohin v. Wylie.*

bury, C., *Enohin v. Wylie*, followed in *Eames v. Hacon*), and in the case where there is an administration suit, the Court of Chancery will follow the grant made by the Court of Probate. If that grant has not been limited to English assets, the decree for administration will not be limited either. But if anything has

*Eames v. Hacon.*  
W. N. 1880,  
p. 200.

been done in a foreign court, 'those proceedings would of course, 'according to the comity of courts, be adopted, according to the 'necessities and exigencies of the case.' (James, L.J., *Stirling-*

*Stirling- Maxwell v. Cartwright.*  
11 Ch: D.  
522.

*Maxwell v. Cartwright*.) But in *Whyte v. Rose* it was held that an administrator might sue in this country on a foreign debt on an English grant alone, and that a foreign grant was unnecessary.

*Whyte v. Rose.*  
3 Q. B. 493.  
*Vanquelin v. Bouard.*  
33 L. J:  
C. P. 78.

In *Vanquelin v. Bouard* however a woman in France became donee of the universality of the succession of her deceased husband, and thereby became entitled to all his property, claims and causes of actions, and also personally liable to his creditors: the husband was liable on a bill of exchange as indorsee, the wife paid the amount and took proceedings and recovered against the acceptor. The Court [Erle, C.J., Williams and Keating, JJ.] held that she might sue on the judgment in her own name without taking out administration; and also, independently of the judgment, if the wife as such donee was capable of personally enforcing the claim against the acceptor by French law, she might enforce it personally here without an English grant of administration.

*Talmage v. Chapel.*  
16 Mass:  
Rep: 71.

The first principle was acted on in *Talmage v. Chapel* [Massa-

Foreign  
probate  
unnecessary  
to sue here  
for foreign  
debt.

But not  
where  
personal  
liability  
undertaken.  
[cf: p. 207.]

Chapter X. chusetts], and by Malins, V.C., in *Macnichol v. Macnichol*, re  
 ----- *Macnichol*, in which case there had also been a judgment obtained  
*Macnichol v. Macnichol*, abroad by the foreign administrator of a creditor against an  
 L. R. 19 English debtor who had since died. The Vice-Chancellor held  
 Eq: 81. that the administrator having established the debt was in the  
 position of a creditor here and could prove against the estate  
 without taking out an English administration. The reason for  
 this is simple, the duty of an administrator is to reduce the assets  
 of the estate into possession, and this has been done by means of  
 the suit and judgment: *quâ* administrator his duty to the estate  
 with reference to that particular debt is at an end, because the  
 debt is reduced into possession, and the estate has become a  
 judgment creditor. But the second principle is not so simple:  
 the court was of opinion that the wife might sue even if she had  
 recovered no judgment. This must evidently depend on the  
 peculiar provision of the French law by which she became, not  
 representative of the deceased in the ordinary sense of the word,  
 that is to say, for the benefit of the estate, but representative for  
 her own benefit, standing in her husband's shoes both as regards  
 assets and liabilities. This is no authority however for saying that  
 the administrator can sue on a debt owing in this country to the  
 estate, without first becoming the personal representative here of  
 the creditor.

*Preston v. Melville*.  
 8 Cl. & F. 1.

The question of the appointment of the administrator having  
 thus been fully considered, the decision in *Preston v. Lord Melville* The adminis-  
 tration of  
 the estate. follows as a matter of course: his appointment being for the  
 purpose of administering the estate in this country, that estate  
 must be administered in the country in which possession is taken  
 of it under lawful authority. In that case the trustees and  
 executors named in a will of a domiciled Scotchman declined  
 to act: the next of kin obtained administration of the personalty  
 here and then consented to the appointment of other trustees and  
 executors by the Court of Session: these raised an action against  
 the next of kin calling on them to transfer the personalty pos-  
 sessed by them under the administration: the House of Lords,  
 reversing the Court of Session, refused it.

*Curling v. Thornton*.  
 2 Add: 6.  
*goods of Dormoy*  
 3 Hagg:  
 Eccl: 767.

Lastly as to succession to personal property in England. Since  
 the intestacy is governed by the law of the domicile; and the  
 appointment of the testator is in conformity with that law, whether  
 declared by foreign decree or not; it follows that the succession  
 to the personalty is also governed by that law (*Curling v. Thornton*). Thus *in the goods of Dormoy*, a domiciled Frenchman

appointed an executor but no residuary legatee : by French law the next of kin was entitled to the residue, and administration was granted to the son : and *in the goods of Beggia*, the Mahommedan law was recognised, and the party specifically empowered to take on behalf of the Emperor of Morocco was held entitled to a grant of administration, in a case of intestacy of a domiciled subject of the Emperor residing here, to the exclusion of the relatives or the Crown.

Chapter X.

*goods of  
Beggia.*  
1 Add: 340.

So in *Doglioni v. Crispin*, where there had been a decree in the Portuguese court that a natural son of the deceased was entitled to the inheritance, the fact having been found that the father was in that station of life in which, by the law of Portugal, such a succession was allowed : the claim of the son to be admitted as a contradictor of an alleged will was allowed in the English court. But although the property in this country will be distributed according to the law of the domicil, interest will be allowed to the legatees according to the *lex fori*, that being a question of procedure (*Hamilton v. Dallas*).

*Doglioni v.  
Crispin.*  
L. R. 1  
E. & I. 301.

[cf: chapter  
vi.]

Rule as to  
succession.

*Hamilton v.  
Dallas.*  
26 W. R.  
326.

It is sufficient for our purpose thus to state the broad rule on the subject of succession, as no fresh questions arise in connexion with it which touch on the subject of foreign judgments. We cannot do better by way of conclusion than to give the general principles enunciated by Lord Westbury, C., in *Enohin v. Wylie*, which form a *résumé* of the whole question :—‘The duty of administering personalty here is to be discharged by the courts here, though in doing so they will be guided by the law of the domicil. Administration of personalty belongs to the court of the country of the domicil at the time of death. All questions of testacy and intestacy belong to the judge of the domicil : it is the right and duty of that judge to constitute the personal representative of the deceased. To the court of the domicil belong the interpretation and construction of the will of the testator. To determine who are the next of kin or heirs of the personal estate of the testator is the prerogative of the judge of the domicil. In short the court of the domicil is the *forum concursus* to which the legatees under the will are required to resort, or the parties entitled to distribution.’

*Enohin v.  
Wylie.*  
31 L. J.  
Ch: 402.

Some of the dicta of the learned Chancellor in the above case have been recently questioned by Lord Selborne, C., in *Orr-Ewing v. Orr-Ewing*. It does not seem certain that Lord Westbury intended to say that administration of personalty belonged solely to the court of the domicil ; but that it certainly did form

*Orr-Ewing  
v.  
Orr-Ewing.*  
9 App: ca:  
34.

**Chapter X.** part of its duty. The recent decision of the House of Lords introduces a modification of the rule : where a deceased person is possessed of personalty in two or more countries, in all or any of which, in order to entitle them to deal with the property there, the original judicial sanction (whether that sanction take the form of probate or confirmation, or any other form) has been brought before the court of another country by the executors, administrators or trustees, to receive the auxiliary sanction according to the law of that country (whether that auxiliary sanction take the form of re-sealing, or any other form), then either country has the power, on the application of a person entitled to it, to make a decree for administration : the questions of convenience, and pending suits, being of course considered. The decision was rested on the ground, which we have already discussed, that the court can order anybody within its jurisdiction to do anything it thinks right. In the case half the trustees were in England, but the other half had been served in Scotland and had appeared : whether, in the case of all the trustees being served abroad, the court could still exercise this personal jurisdiction seems hardly to have been decided : that case however somewhat resembles the point raised in *ex parte Robertson* noticed on pages 86 and 335.

Decree for administration may be made by any country in which the will has been proved.

[cf: chapter ii.]

*ex pte*  
*Robertson*.  
L. R. 20  
Ex: 740.

From wills of personalty we pass now to wills of realty, which must be noticed shortly.

The general rule may be thus stated : the *lex domicilii* disappears, and its place is taken by the *lex loci rei sitæ* ; in other words the rule that realty is governed by the law of the country in which it is situate, extends to wills made by foreign owners of such realty even if residing abroad. The reason is simple, for the will itself is the conveyance of the property. Therefore, if the deceased dies intestate, the succession to the realty is governed by the *lex loci rei sitæ* : the construction of the will, if he dies testate, will be governed by the rules of construction of that country : the validity of the will must depend on whether the forms and solemnities required by the law of that country have been complied with : the capacity or incapacity of the foreigner to make the will is to be judged of in the same way as if he were a subject of the country. The *lex domicilii* however must still govern the fact on which the capacity or incapacity depends. For example if by the law of the country where the realty is situate, a minor cannot make a will devising such realty, a foreigner, a minor, will not be allowed to make such a will ; but the fact whether he is a minor or of full age must as before depend on the law of his domicil.

Wills of realty.

The opinions of the jurists on this subject have been collected **Chapter X.**  
by Story [Conflict of Laws, §§ 474-478].

*Westlake.*

Westlake [International Law, 2nd ed : § 160] advocates a more lenient view. He says 'No general rule can be laid down for the construction of contracts, wills, or other dispositions concerning immoveables. A stringent rule of construction existing by the *lex situs* of the immoveables concerned, will of course prevent any instrument from affecting the immoveables except in accordance with it, but, otherwise, a reasonable regard must be had to all the circumstances, including the *locus contractus* or *actus*, and the national character or domicile of the parties, testator, or other disposer.'

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Lastly, we must consider what respect will be paid to the bankruptcy proceedings of another country. Bankruptcy.

Proceedings in bankruptcy consist of two parts,—the adjudication, and the discharge :—And as the Court of Bankruptcy makes an order at each of these stages, both the adjudging the person to be bankrupt, and the final discharge from his debts and obligations may be considered, for the purpose of this treatise, strictly as judgments of the court.

The international effect of bankruptcy will therefore be considered under the following heads :— Division of the subject.

- i. The adjudication and assignment.
  - a. the effect of a foreign adjudication in England.
  - β. the effect of an English adjudication abroad.
- ii. Concurrent bankruptcy proceedings, including the bankruptcy of partners.
- iii. The final discharge, and its effect on the bankrupt's obligation.
  - a. where the discharge is by the courts of the country of the contract.
  - β. where the discharge is by the courts of any other country.
- and lastly
- iv. the status of the bankrupt.

#### i. THE ADJUDICATION AND ASSIGNMENT.

##### a. *The effect of a foreign adjudication in England.*

The subject of bankruptcy involves two questions of status : the adjudication, that of the person made bankrupt : the assignment, that of the person appointed to collect and distribute the estate for the benefit of the creditors. And we have as before to consider two points, first, what country has a right to adjudicate a person bankrupt and appoint an assignee ; secondly, is the status of the assignee recognised beyond the jurisdiction in which he was appointed : in other words, is all the bankrupt's property wherever situate universally considered as vested in the assignee ; The questions of status involved.

are all the creditors bound to prove their claims in the foreign Chapter X.  
bankruptcy, or is a fresh adjudication and auxiliary assignment  
necessary in this country? It will be convenient to take the  
second point first, as the cases throw some light on the question  
of jurisdiction.

Is the status  
of assignee  
recognised  
beyond the  
country  
where  
appointed?

In *Solomons v. Ross*, there was a bankruptcy in Holland, and the  
Chamber of Desolate Estates appointed a curator to manage the  
estate: the defendant had attached moneys due to the bankrupt  
in England and obtained judgment by default on the attachments:  
in satisfaction of the judgment he took the plaintiff's note for the  
amount at one month: a few days afterwards a bill was filed by the  
curators to pay the amount to them and to restrain the payment  
under the judgment. On an interpleader by the debtor, the money  
was ordered to be paid to the curators and the injunction was  
granted.

*Solomons v.  
Ross.*  
1 H. Bl:  
131<sup>n</sup>

In *Jollet v. Deponthieu*, under almost the same circumstances,  
the English creditor was restrained from proceeding with an  
attachment; and in *Neale v. Cottingham*, money already received  
was ordered to be paid to the foreign curator.

*Jollet v.  
Deponthieu*  
1 H. Bl:  
132<sup>n</sup>.  
*Neale v.  
Cottingham*  
1 H. Bl:  
132<sup>n</sup>.

Lord Loughborough, C.J., in the argument in *Folliott v. Ogden*  
said that these cases were decided solely on the principle that the  
assignment of the bankrupt's effects to the curators in Holland  
was an assignment for valuable consideration, and therefore acknow-  
ledged in this country. And the principle was approved by the  
majority of the Court in *Phillips v. Hunter*:—‘Lord Hardwick  
‘plainly considered each creditor as bound by the assignment, and  
‘the money recovered here as referable to Holland, the country of  
‘the debtor;’ and again by Lord Loughborough in *Sill v. Worswick*:—  
‘The determinations of the courts of this country have been  
‘uniform to admit the title of foreign assignees.’ In the cases  
just cited ‘the Court of Chancery held that the curators had  
‘immediately on their appointment a title to recover the debts  
‘due to the insolvent in this country in preference to the diligence  
‘of the particular creditor seeking to attach those debts.’

*Folliott v.  
Ogden.*  
1 H. Bl:  
124.

*Phillips v.  
Hunter.*  
2 H. Bl:  
402.

*Sill v.  
Worswick*  
1 H. Bl:  
665.

In *Brickwood v. Miller*, one of the partners of a West India  
firm resided in London and became bankrupt. A creditor both of  
the firm and of the partner attached property in the West Indies:  
he was held entitled to retain the money he had received to the  
extent of satisfying his joint debts, but to be accountable to the  
assignees for the overplus.

*Brickwood  
v. Miller.*  
3 Mer: 279.

Peculiar  
right given  
by foreign

On the same principle, any special or peculiar right which may  
be given by the foreign law to the trustees will be recognised in

**Chapter X.** this country. As in *Alison v. Furnival*, where the right of two out of three syndics to sue under a French bankruptcy was allowed. law to trustee recognised. [cf. p. 20.]

*Alison v. Furnival.*

3 L. J.

Ex: 241.

*re Blithman.*

L. R. 2 Eq:

23.

We now come to more recent cases.

In *re Blithman*, one Henwood was entitled to personalty in England subject to his mother's life interest in it: he went to reside in Australia and became bankrupt: after this insolvency his mother died, and before he had obtained his discharge he also died. The trustee under the will paid the money into court; on a petition by his widow as executrix for payment out of court, the question was raised whether the Australian assignees had not the better title. Lord Romilly, M.R., said that the question was one purely of domicile, that if Henwood were domiciled in Australia 'at the time' (presumably at the time of the commencement of the bankruptcy proceedings), then the property would pass to the assignees, but that if he were not, then it would pass to his legal personal representative. He therefore directed the question of domicile to be inquired into.

It was argued that even if the domicile were not Australian, as there had been an insolvency abroad, it was equivalent to a foreign judgment, and the court would by comity give effect to it, irrespective of the question of domicile. To this argument the learned Master of the Rolls said he was disposed to assent; but not so as to give effect to it in the way asked by the assignees:—'I think that the legal personal representative must receive the fund in the first instance, and that the assignees can only obtain payment here by suing for the amount. If a person domiciled in England had in his life contracted debts abroad, for which a foreign judgment had been obtained, the judgment creditor might sue the legal personal representative in this country for the purpose of recovering upon that judgment. Various questions may thereupon arise. He is not entitled to take away the whole of the funds, but questions of priority, questions of other judgments, and other considerations may arise: they may be entitled to be paid *pari passu*, or the executors may be entitled to contest the foreign judgment or the like.' It is exceedingly difficult to understand this decision, for it will be noticed that it does not go the length of holding that the court of the domicile is the only one competent to adjudicate a person bankrupt: it indeed expressly says that the status of the assignee will be recognised if he sue the personal representative for the fund, but that this course must be adopted if he has not been appointed by the court of the bankrupt's domicile.

Doctrine enunciated by Romilly, M.R.

Not  
approved by  
*James, L.J.*

Now the facts in *re Davidson's Settlements* were precisely similar. **Chapter X.**  
There was a fund in court to which the deceased bankrupt was entitled, a power of appointment under a will not having been exercised; the petition for payment out was filed by the assignee of the bankruptcy in Queensland. It was opposed by the widow as personal representative. *James, L.J.*, held that the question of domicile was perfectly immaterial; that the facts of there having been an adjudication in insolvency in Queensland, and of there being debts proved in the insolvency still unsatisfied, rendered it necessary that a sum of money paid into Chancery in England to the credit of the insolvent should be applied towards payment of the debts proved in Australia, in priority to any claim by an English administrator, and therefore that neither the representative nor the next of kin were entitled to come in unless there were a surplus. 'I may add,' he said, 'that it would be impossible to 'carry on the business of the world, if courts refused to act upon 'what had been done by other courts of competent jurisdiction.' He refused to consider the decision in *re Blithman*, but that case was in effect overruled.

*re Davidson's  
Settlements.*  
L. R. 15  
Eq: 383.

*re Blithman*  
L. R. 2  
Eq: 23.

Conclusions.

Effect of  
notice of  
foreign  
bankruptcy  
during pro-  
ceedings in  
England.

The conclusions may be stated to be, that if during the course of English proceedings affecting personal property, notice is given that the owner of the property has been adjudicated bankrupt by a foreign court, the English court will recognise, and if requested, will give effect to the foreign adjudication, by staying the English proceedings; and in a suit by the foreign trustees, by ordering the property to be handed over for the benefit of the creditors under the foreign insolvency:—

After  
proceedings  
terminated.

And that, even if the English proceedings have terminated, and the property has been attached in ignorance of the insolvency abroad, yet that insolvency will be recognised, and effect will be given to it in an action by the trustees against the attaching creditor, on the foreign order of insolvency as on a foreign judgment.

Rule applies  
to per-  
sonalty.

As to realty.

This principle must be taken to apply to personal property alone: as regards realty, the rule that it must be governed by the *lex loci rei sitæ* is of universal application, and it cannot therefore be considered to pass to the assignees under an adjudication of a foreign court, even though the laws of the foreign state should assume to vest such property in the persons appointed to collect the bankrupt's estate—as would appear to be the case under the 44th section of the English Bankruptcy Act, 1883—(46 & 47 Vic: c. 52).

**Chapter X.** Where jurisdiction in bankruptcy has been assumed by the foreign court, it is presumed that the question must be considered in the same manner as assumed jurisdiction in other cases. Both in *re Blithman*, and *re Davidson's Settlements*, the Colonial Act under which the bankruptcy proceedings had been taken, vested all the property of the insolvent in the assignee, that is, all the property within or without the jurisdiction. This indeed is the universal rule and may be said now to be an admitted rule of International law.

The English jurisdiction in bankruptcy is now for the first time settled; by condition (a) of section 6 (1) of the new Act of 1883, it is provided that a creditor shall not be entitled to present a bankruptcy petition against a debtor, unless

46 & 47 V.  
C. 52.  
s. 6 (1) (a)  
English  
rule of  
jurisdiction.

The debtor is domiciled in England, or, within a year before the date of the presentation of the petition, has ordinarily resided or had a dwelling-house or place of business in England.

We have already noticed that the words 'domicil or usual residence' have also been introduced for the first time in Order XI., by the New Rules of 1883; for the purposes of jurisdiction the word domicil is acquiring in English law a much wider construction than was ever applied to it before.

The acts done out of the jurisdiction which constitute acts of bankruptcy are defined by section 4 (1): they are as follow:—

s. 4 (1)  
Acts of  
bankruptcy  
out of  
jurisdiction.

(a) If in England or elsewhere he makes a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally:

(b) If in England or elsewhere he makes a fraudulent conveyance, gift, delivery or transfer of his property or of any part thereof:

(c) If in England or elsewhere he makes any conveyance or transfer of his property or any part thereof, or creates any charge thereon which would under this or any other Act be void as a fraudulent preference if he were adjudged bankrupt.

(d) If with intent to defeat or delay his creditors he does any of the following things, namely, departs out of England, or being out of England remains out of England, or departs from his dwelling-house, or otherwise absents himself, or begins to keep house.

It will be noticed that section 6 (1) (a) uses the words 'within a year before the presentation of the petition has ordinarily resided, or had a dwelling-house, or place of business in England.' The resumption of residence abroad may perhaps be now attended with unpleasant consequences: it remains to be seen how far the case *ex parte Crispin, re Crispin* is now applicable.

Bankruptcy of persons usually residing abroad.

In *ex parte Brandon, re Trench*, a domiciled Englishman went to reside permanently in France. For the purpose of carrying on

*exp: Crispin.*  
L. R. 8  
Ch: 374.  
*exp: Brandon, re Trench.*  
25 Ch:  
D. 500.



a business he afterwards came to reside for a considerable period in England; on that business failing, and having incurred some debts in connection with it, he returned to his house in France, which he had let during his English residence, thinking 'if he kept 'abroad he might be able to settle them more easily.' The Court of Appeal held that as he was remaining abroad at his own permanent residence, no intent to defeat or delay his creditors could be imputed to him. Chapter X.

### Rule 148.

r. 148.  
Service of  
petition out  
of jurisdic-  
tion.

Where a debtor petitioned against is not in England, the court may order service to be made within such time and in such manner and form as it shall think fit.

Debtor's  
summons.

The common law rule as to actions brought by foreigners applies to debtors' summonses: that is to say, a foreigner may take out a debtor's summons against another foreigner who happens to be in England in respect of a debt contracted abroad. (*ex parte Pascal, re Meyer*).

*exp: Pascal*  
1 Ch. D.  
509.

Winding  
up of  
foreign  
companies  
conducting  
business  
here.

With regard to the jurisdiction of the English court in the winding up of foreign companies, the general rule is that although the locale of the company be abroad, yet if its affairs are in any way conducted in this country, the court will, if necessary, make an order. (*re Madrid and Valencia Ry. re Factage Parisien. re Commercial Bank of India*.) A company may be registered in England, if some kind of management or business is contemplated here: but even if after registration no business has ever been carried on here, still the court has jurisdiction to order the company to be wound up, although all the shareholders are foreigners. Lord Justice Giffard said, 'It is said that although I make this 'order, recourse to the foreign courts will probably be necessary. 'But according to all the principles of international law the foreign 'courts will recognise this winding up, and will aid in carrying out 'any directions that may be given under it. (*re General Land Credit Co.*; affirmed the House of Lords, *sub nom: Reuss v. Bos*.)

*re Madrid*  
*Ry.*  
3 De G. &  
S. 127.  
*re Factage*  
*Parisien.*  
34 L. J.  
Ch: 140.  
*re Bk: of*  
*India.*  
L. R. 6  
Eq: 517.

In *re the Union Bank of Calcutta* the company was Indian, but it had correspondents in this country. An important modification of the rule was laid down: Although the court has jurisdiction, that does not render it necessary for it to act, 'if it is not shewn 'that there exists in this country means of doing substantial justice, 'or more good than harm by so interfering.'

*re General*  
*Land Co:*  
L. R. 5 Ch:  
363.  
*Reuss v.*  
*Bos.*  
L. R. 5  
E. & I. 176.  
*re Bk: of*  
*Calcutta.*  
3 De G. &  
S. 253.

If the company is foreign, its formal incorporation by the

**Chapter X.** foreign law must be shewn: otherwise it cannot be considered to have any existence (*re Imperial Anglo-German Bank.*)

*re Anglo-German Bk.*  
26 L. T. 229.  
*re Oriental Co.*  
L. R. 9  
Ch: 557.  
The bankruptcy rule as to foreign creditors who have recovered applies to winding up. Thus in *re Oriental Co.*, *ex parte Scinde Ry.*, a foreign company was being wound up: judgment had been obtained in India by some of the creditors who had proved under the winding up: they were not allowed to attach property in India belonging to the company.

*β. The effect of an English adjudication abroad.*

On the preliminary and simple question, whether the appointment of the English assignee will be recognised abroad, so as to entitle him to recover debts due to the bankrupt's estate, there is no doubt that in almost every country his title will be so recognised. We believe there is now scarcely an exception to the rule.

Effect of  
English  
adjudication  
abroad.  
*Story*,  
§§ 403-409.

‘If the bankrupt happens to have property which lies out of the jurisdiction of the law of England; if the country in which it lies proceeds according to the principles of well-regulated justice, there is no doubt but that it will give effect to the title of the assignees’ (Lord Loughborough, C.J., *Sill v. Worswick.*) See also *Le Chevalier v. Lynch*, in which case Lord Mansfield said:—‘If a bankrupt has money owing to him out of England, the assignment under the bankrupt laws so far vests the right to the money in the assignees, that the debtor shall be answerable to them and shall not turn them round by saying he is only accountable to the bankrupt’; and *ex parte Blake*, in which it appeared that the American courts had not recognised an English assignment; Lord Thurlow said:—‘I had no idea of any country refusing to take notice of the rights of assignees under our laws: and I believe every country on earth would do it.’

*Le Chevalier v. Lynch.*  
1 Dougl:  
170.

*exp: Blake.*  
1 Cox Eq:  
398.

But where, either without regard to, or in ignorance of the English assignment, there has been a judgment by attachment given abroad, great complications arise; and the form of the enquiry in reality is:—What respect is to be paid to the foreign judgment under such circumstances?

Judgment  
abroad  
without  
regard to, or  
in ignorance  
of, English  
assignment.  
What respect  
to be paid  
to it?

If intimation of the English bankruptcy is given to the foreign court, it ought, as we have seen, to respect it, and not allow the suing creditor to attach the property:—But if, although intimation is given, yet the foreign court disregards it and the attaching creditor recovers, both Story and Westlake are agreed that the English courts will abide by the foreign decision; ‘if the local

*Story*,  
§ 409.

‘laws (however incorrectly on principle) confer on him an absolute ‘title’ :—‘Although,’ adds Story, ‘it *should* be disregarded.’

Chapter X.

Nationality  
of party.

This agrees with the general theory of foreign judgments : But here a distinction is drawn dependent upon the nationality of the party who has recovered under the foreign judgment.

Where the  
judgment  
recovered  
by an  
Englishman.  
Difference  
between  
English and  
foreign  
creditor.

If the creditor be an Englishman, he will be held to have recovered to the use of the assignees. If he be a foreigner he will not be held to have recovered to their use.

The principle upon which this distinction rests seems to be that the English creditor should have, and perhaps has, proved under the English commission :—The object of his suit in the foreign court is therefore to obtain an unfair advantage, which the English courts, proceeding on the principle of equality among the creditors, will not allow him to retain. But the case of the foreign creditor is different : In seeking to attach the property, he is only pursuing his legal remedy ; and not being subject to the English laws, he does not endeavour thereby to avoid any obligation under them. He may indeed prove under the English commission ; but, as we shall see, he will be compelled, if he does so, to bring into the general fund any money he may have already recovered.

Before considering the cases, it will be necessary to carry the doctrine one step further :

Notice  
immaterial  
in case of  
Englishman.

It is immaterial, in the case of an English creditor, whether the trustees gave notice of their claim to the foreign court, or not :—for the question of notice cannot affect the motives of the creditor in attaching the property by the aid of the foreign court.

The leading cases with regard to the English creditor are *Sill v. Worswick* and *Phillips v. Hunter* [on appeal from the case *sub nom. : Hunter v. Potts*]. The doctrine was also acted upon in Ireland in *re Robinson*.

Rule in  
*Sill v.*  
*Worswick*.

In *Sill v. Worswick*, the rule was laid down that if, after an act of bankruptcy, but before an assignment, a creditor attaches a debt in England, and receives, after the assignment, money due to the bankrupt abroad, the assignees might recover the money in an action for money had and received. Lord Loughborough, C.J., said ‘if the assignees had sent a person to St. Christopher’s to act ‘for them, if they had given notice of the assignment the court in ‘the island ought unquestionably to have preferred the title of the ‘assignees to the title of the creditor using the process of attachment, because the law of the country to which the creditor ‘making the demand was subject had on a just consideration ‘vested that property in them.’

*Sill v.*  
*Worswick*.  
2 H. Bl:  
665.  
*Phillips v.*  
*Hunter*.  
2 H. Bl:  
402.  
*Hunter v.*  
*Potts*.  
4 T. R. 182.  
*re Robinson*  
11 Ir. Ch:  
Rep. 385.

Chapter X. In *Phillips v. Hunter* the majority of the Court [Macdonald, C.B., Thompson, Perryn, Hotham, BB: Rooke, Heath, JJ:] held that, with or without notice by the assignees, an English creditor, having recovered money by process of attachment in a foreign country, received it to the use of the English assignees. Eyre, C.J., however dissented, treating the question on the general principles of the recognition of foreign judgments, and refusing to take into consideration the fact that the judgment had been obtained in contravention of the English laws. But this principle has always been recognised, and to such an extent that in *Macintosh v. Ogilvie*, 'Lord Hardwicke, by a writ of *ne exeat* prevented 'the creditor from going to sue in Scotland after the bankruptcy. 'By giving this preventative remedy against an unconscientious preference, which one creditor might have obtained over 'the others, his Lordship must be understood to say that the 'creditor was bound, as far as the circumstances would enable 'him to apply them, by the bankrupt laws of his country; and 'had that creditor effectuated his payments in Scotland, it would 'seem that his Lordship, in order to be consistent, would have 'obliged him to have accounted with the assignees if the fund had 'been brought within his jurisdiction.' (Majority of the Court—*Phillips v. Hunter*.)

Majority of  
the Court in  
*Phillips v.*  
*Hunter*.

*Eyre, C.J.,*  
dissenting.

*Macintosh*  
*v. Ogilvie*,  
cit: 4 T. R.  
191.

*Phillips v.*  
*Hunter*.  
2 H. Bl:  
402.

Lord Chief Justice Eyre however ridiculed the proposition that a British subject shall not be allowed to contravene a British Act of Parliament:—'It is a specious and very splendid proposition, he said, 'but it is not solid; and if it were solid, it concludes 'nothing towards the support of this action. As a proposition in 'ethics, I have no objection to it; but considered as a proposition of law, it is too general, concluding, as I have before 'observed, in nothing.' 'It was well said in the argument, you 'admit an American might in this case have pursued his legal 'diligence in the courts of his own country, notwithstanding our 'bankrupt laws, and that you could not have taken from him the 'money recovered, and given it to the assignees: Will you then 'compel a British subject to sit still and see the foreigner exhaust 'that fund, which might have satisfied his debt and so far relieved 'the fund for the creditors at home? I have heard no answer to 'that question.'

The answer must evidently be yes: because all rights of persons who can prove in the bankruptcy are vested in the assignee, as well as all the debtor's rights: he represents both the debtor and the creditors: it is therefore his duty to get possession of the

money in question as soon as possible ; if he is guilty of negligence the creditors have their remedy against him.

The judgment not in reality disregarded.

It must however be noticed that the majority of the court declared that the judgment was not disregarded, but rather regarded; for since the money recovered, if retained by the plaintiff, would be in contravention of an Act of Parliament, and the recovery therefore must be taken to be for the use of the assignees, yet the judgment was still final and conclusive *between the parties* :—‘In an action for money had and received, the ‘receipt shall be always deemed to enure to the use of him who ‘hath the right, even though it be taken in an adverse title.’ To this Eyre, C.J., replied, that, ‘upon a judgment recovered and ‘executed, which for the sake of argument I suppose ought not to ‘have been recovered, an action for money had and received ‘will not lie for anybody, not even for the person against whom ‘the judgment has been so unjustly recovered.’

Judgment recovered by a foreigner.

But with regard to a foreigner, as we have said, the rule is different. He will not be held to have recovered to the use of the trustees. And this whether there has been notice or not.

Westlake thinks however that he would be so held ; but Story does not distinguish a recovery by a foreigner without notice, from a recovery with notice, in which case, it will be remembered, the foreign judgment will be respected. Eyre, C.J., in *Phillips v. Hunter* did not approve of the principle that the foreigner should be held to have recovered to the use of the trustees ; and Lord Loughborough, C.J., in *Sill v. Worswick*, expressly said, ‘I do ‘not wish to have it understood that it follows as a consequence ‘from the opinion I am now giving (I rather think the contrary ‘would be the consequence of the reasoning I am now using) that ‘a creditor in the foreign country, not subject to our bankrupt ‘laws, nor affected by them, obtaining payment of his debt and ‘afterwards coming over to this country would be liable to refund ‘that debt. If he had recovered in an adverse suit with the ‘assignees, he would clearly not be liable.’

*Phillips v. Hunter.*  
2 H. Bl:  
402.

*Sill v. Worswick.*  
1 H. Bl:  
665.

Division of subject for consideration :  
a. English trustee going abroad.

First let us consider what would result from the English trustee going abroad or commencing an action abroad to recover the debt : He finds it has been already recovered by a foreign creditor before notice could have been given : as to the preliminary question, the right of the trustee to sue simply, we find, as we have said, an almost universal rule of recognition being accorded to his title : but in this more complicated case it cannot be said with the same certainty that his title would be recognised to such an extent that



**Chapter X.** the creditor would be compelled to refund to the trustees ; it is possible that the trustee might succeed, but the question must evidently depend on the current of the decisions of the foreign courts, and these must of course vary in each country : the policy of absolute equality among unsecured creditors may not be the policy of the laws of the foreign country. The doctrine of complete recognition of foreign assignees which, as we have seen, prevails in England, does also prevail in some countries : the most remarkable instance of it is to be found in the Italian case, *Hoffman v. Mack* [see p. 484], in which an attachment by an Italian creditor was set aside on the application of the English trustee, the creditor being sent to prove in the English bankruptcy. But that is a very different thing from an exercise of jurisdiction over the foreign creditor by the English court ; and therefore when we come next to consider what would be the effect of the foreign creditor, who has recovered abroad without notice, coming into this country, there can be no other answer but that the court can have no jurisdiction to interfere : For when the English creditor sues pending a bankruptcy, the law presumes him to sue as trustee for the other creditors, wherever the action may be brought : but this presumption cannot be raised in the case of a foreign creditor who does not choose to prove under the English commission. The whole question therefore is one which must be left to the foreign court : and indeed the question of notice seems perfectly immaterial.

*b.* Foreign creditor coming to England after recovery.

It must be remembered that it is perfectly optional whether the foreigner proves his debt under the English bankruptcy ; but the circumstances are altered if he desires to come under the English commission ; he must then bring into the common fund any money that he may have already received abroad [see ante p. 86]. And Vice-Chancellor Malins carried this principle further. In *ex parte Robertson, re Morton*, he held that a foreigner, although residing out of the jurisdiction, having proved a debt in the bankruptcy, brought himself within the jurisdiction of the court just as if he were residing in it ; he therefore made an order on him to restore property of the bankrupt improperly in his possession.

Foreigner proving here must bring in all money received abroad.

*exp:*  
*Robertson.*  
L. R. 20  
Eq : 733.

Shortly, the conclusions from the two parts of this section of the subject are as follow :

An English creditor having recovered a debt abroad against a person who has been declared insolvent in England, with or without notice, will be held to have recovered to the use of the trustee.

English creditor.

An English creditor having recovered a debt in the English courts against a person who has been declared insolvent by a foreign court, and of which insolvency no notice has been given, will be held liable to refund at the suit of the foreign trustee.

Foreign creditor.

A foreign creditor having recovered abroad will not be held by the English courts to have recovered to the use of the English trustee, unless he afterwards prove in the bankruptcy : but in many countries he will be held to have so recovered by the foreign court.

The paragraph from Westlake, to which we referred above, is as follows :—

Westlake.

4. And lastly, we may probably add that if no intimation was given previous to the completion of the recovery by attachment, the same presumption—that the money was recovered to the use of the assignees—will be raised, and the creditor, *whether foreign or English*, compelled to refund, although the law of the place of attachment might refuse efficacy to such intimation even if given *pendente lite*.

[At least no enquiry seems to have been made about the law of the place of attachment in *Hunter v. Potts*, *Sill v. Worswick*, or *Phillips v. Hunter* ; and the distinctions there suggested on the creditor's nationality refer only to the case of an intimation actually given.]

*Hunter v. Potts*.  
4 T. R. 182.  
*Sill v. Worswick*.  
1 H. Bl: 665.  
*Phillips v. Hunter*.  
2 H. Bl: 402.

Administration of assets by *lex fori*.

Priorities in the administration of the assets, being a pure question of procedure, must depend on the *lex fori*, in the same way as the distribution of an estate by an administrator (*ex parte Melbourne, re Melbourne ; Thorburn v. Steward*).

*exp: Melbourne*.  
L. R. 6  
Ch: 64.  
*Thorburn v. Steward*.  
L. R. 3  
P. C. 478.

## ii. CONCURRENT BANKRUPTCY PROCEEDINGS.

We have already, in the chapter on Injunctions [pp : 83 *et seq.*] discussed the power of the English court to restrain actions commenced abroad pending or commenced during bankruptcy proceedings in this country : it is evident however, the power to make a person bankrupt depending on his carrying on business in the country rather than on actual personal residence therein, that there may be concurrent bankruptcy proceedings in two or more different countries. The question of course arises most frequently in the case of firms carrying on business in several countries.

Possibility of concurrent bankruptcy proceedings existing.

Most frequently arises in bankruptcies of firms.

As it is within the strict right of each country to allow bankruptcy proceedings to be commenced, so it must be beyond the power of either country to take any steps towards stopping or delaying the progress of the proceedings in the other country.

**Chapter X.** What steps are to be taken to prevent the inevitable confusion

must therefore be left to the discretion of the courts in the two countries. But, as we have already seen when considering the effect of the adjudication and assignment, the title of a foreign assignee will be recognised so as to enable him to bring actions for the purpose of getting in debts owing to the bankrupt's estate; so too we have seen that creditors of the estate will be sent by their own courts to prove in the foreign bankruptcy, although this doctrine is not so universally adopted as the former one: the question therefore takes this form, will these rules be altered in any way by the fact that there are bankruptcy proceedings pending in the country in which the assignee sues or the creditor proves? There are to be found cases in which the simple rule of priority is laid down; that is to say, the court which has, rightly according to the jurisdiction given to it by its own law, first issued a bankruptcy commission, will be allowed to continue and to conclude the winding-up of the whole estate. This indeed is the only logical conclusion which can be drawn from the rules, and it is supported by the weight of Mr Chancellor Kent's authority in *Holmes v. Remsen* [New York]:—‘There would be great inconvenience in allowing co-existing commissions upon a bankrupt's estate to have concurrent operation *simul et simul* in different countries, unless the one that is subsequent in point of time be used merely as the means of assisting the distribution of the funds under the other. It would be in the power of the bankrupt to throw his property under the distribution of either commission at his pleasure; and it would put creditors upon calculations of exclusive advantages, and of running a race of diligence against each other, and of resorting to the one fund or the other as circumstances might dictate. The perplexities arising from the concurrent operation of distinct commissions would be increased, if the commercial house had establishments in different countries, with joint and separate debts belonging to each firm to be distributed. Such a state of things, and such conflicting systems would lead to great inconvenience and confusion, and be a source of fraud and injustice, and disturb the quality and equity of any bankrupt system.’

The rule of priority.

Kent.

*Holmes v. Remsen.*  
4 Johns:  
Ch: 460.

*ex p: McCulloch,*  
*re McCulloch.*  
14 Ch: D.  
716.

In *ex parte McCulloch, re McCulloch*, the question was thus dealt with. A petition had been presented in England; but before it could be heard, the trader obtained an adjudication against himself in Ireland. The Court of Appeal decided that there must be an adjudication in England for what it would be

English cases.

worth. 'After the adjudication, and when the matter has been further investigated and the facts ascertained either in this court or in Ireland, one of the two courts may come to the conclusion that it is better that the proceedings on one of the petitions should be stayed, and possibly that one of the adjudications be annulled.' (James, L.J.)

In *ex parte Robinson, re Robinson*, the Court of Appeal [Jessel, *exp: Robinson, re Robinson*, W. N. 1883. p. 34. M.R., Baggallay, Lindley, LL.J.] held that although there is jurisdiction to make an adjudication of bankruptcy, notwithstanding the existence of an unclosed foreign bankruptcy against the debtor in which he has not obtained a discharge, yet the court has a discretion in the matter, and will decline to make an adjudication if it does not appear that the debtor has any assets in England, or that he has any debts contracted since the commencement of the foreign bankruptcy.

The Master of the Rolls held further that *primâ facie* the existence of the foreign bankruptcy would be a reason for declining to make an adjudication.

Where joint and separate commissions are concurrent.

So far we have considered only concurrent commissions of equal degree; that is to say, concurrent joint or concurrent separate commissions. The question however may be further complicated in the case of the bankruptcy of a firm, by there being a joint commission in one country, and a separate commission against one of the partners in another.

In *ex parte Cridland*, a joint commission of bankruptcy here was not superseded on the ground of a separate commission against one of the partners proceeding in Ireland. *exp: Cridland*, 3 V. & B. 94.

The point was discussed but not decided by the Privy Council in *Lyall v. Jardine*. Lord Cairns, C., said, 'Their lordships are not satisfied that the circumstance, that before the proceedings in bankruptcy were taken at Hong Kong there had been a London bankruptcy of Mr Lyall alone, would necessarily have prevented, or ought properly to have prevented, the adjudication against the firm in the colony.'

*Lyall v. Jardine*.  
L. R. 3  
P. C. 318.

The case therefore is very different from the former one; in that, the fact of a commission already issued was shewn to be a *primâ facie* reason for a refusal to grant a second adjudication: in this, that reason does not exist; the existence of a joint commission does not warrant a refusal to grant a separate commission, and *vice versa*. Questions however would then arise 'between the assignees under the two bankruptcies as to what were their relative rights of property'; and the determination of these questions seems to

The questions between the assignees should be settled according to the rule of priority.

**Chapter X.** be furnished (in the absence of authority) by the rule of priority, so that in this respect this case resembles the former one. For example, if the joint commission has been first issued, we will suppose, abroad; then the rights of the foreign trustees against the separate estate of the partners according to foreign law, would be respected, and the rights of the trustees under the English separate bankruptcy would be suspended until the former were satisfied. If the separate commission abroad had issued first, then again the trustee under the English joint commission would be compelled to stand aside until the claims of the foreign trustee against the partnership assets (if any, and if prior to partnership claims by foreign law) had been dealt with.

A still more complicated question is presented by the case of *re O'Reardon*; there were two partners, one carrying on the business in London, the other in Dublin: there was an adjudication issued against the partner in England, and then one against the other partner in Ireland: there was afterwards a joint adjudication in Ireland. There were a considerable number of joint creditors, and a large amount of joint assets in this country. The Lords Justices refused to interfere with the decision of the Registrar refusing to order these assets to be paid to the Irish assignees of the joint bankruptcy; the effect of a joint adjudication after a separate adjudication in the same country was discussed, and the ground of the decision was that the joint adjudication was in point of effect inoperative.

If there are concurrent commissions the rules restraining double proof will of course be the same whether they are both joint, or both separate, or one separate and the other joint.

In *ex parte Chevalier, re Vanzeller*, there was a process of insolvency abroad against the foreign firm, and a commission against an English partner. The foreign firm had drawn bills on the partner who was trading on his own account in England, payable to an agent of the foreign government: he was restrained from receiving dividends here, unless he elected not to prove under the insolvency abroad.

And in *ex parte Goldsmith, re Deane*, bill-holders of a firm in Pernambuco, having received a dividend under a *concordata* by Brazilian law, were held not entitled to prove under the English bankruptcy, although different rules as to distributing the joint and separate estates existed in the two countries: unless, it is presumed, the money thus received were brought into the common fund in England.

*re O'Reardon.*  
L. R. 9  
Ch: 74.

*ex p:*  
*Chevalier,*  
*re Vanzeller.*  
1 Mont: &  
Ayr: 345.

*ex p:*  
*Goldsmith,*  
*re Deane.*  
De G. & J.  
67.

Joint com-  
mission after  
concurrent  
separate  
commissions.

Restriction  
against  
double proof.



Identity of parties.

With regard to the bankruptcy of partners, or of persons partners in firms carrying on business in two or more different countries, the same rules hold good as to the identity of the parties to the two bankruptcies. It does not follow that because there are two firms, one in England and the other abroad, trading even under different styles, that they are not to be considered identical: thus in *Bank of Portugal v. Waddell, re Hooper*, two men carried on business in England as 'Hooper and Sons,' and in Portugal as 'Hooper Brothers,' they were held to be identical parties.

Chapter X.

Bk: of Portugal v. Waddell, re Hooper. 5 App: ca: 161.

### iii. THE FINAL DISCHARGE, AND ITS EFFECT ON THE BANKRUPT'S OBLIGATIONS.

Effect of bankrupt's discharge on his obligations.

Hitherto we have considered only the effect of bankruptcy on the bankrupt's own property, and on the debts owing to him; we now advance to the last stage of the proceedings—the order given by the court that the debtor be discharged from his obligations.

#### a. *Where the discharge is by the courts of the country of the contract.*

Meaning of 'country of contract.'

As we have already pointed out the words 'country of the contract' has in reality two significations, the place where it was made, the place where it is to be performed: if these places differ, the difference being ascertained by the intention, express or implied, of the parties, then the country of the contract is the place of performance, and the law by which the contract is governed is the law of that place: if there is no difference, or if the intention of the parties cannot be inferred, then the country of the contract is the place where it was made, and the law by which the contract is governed is the law of that place.

Discharge by country of contract. The obligation extinguished.

There is no doubt that an obligation is extinguished by a discharge under the laws of the country where the contract was entered into, and that this discharge will be recognised by the courts of every other country.

*Ballantyne v. Golding.* Cooke's Bk: Laws, 8th ed: 487.  
*Pedder v. Macmaster.* 8 T. R. 609.  
*Potter v. Brown.* 5 East, 124.  
*Quelin v. Moisson.* 1 Knapp. 266n.  
*Gardiner v. Houghton.* 2 B. & S. 743.  
*Clerke v. Emery.* 1 F. & F. 446.

This principle was acted on in *Ballantyne v. Golding*: but in *Pedder v. Macmaster* it appears to have been thought an open question. It was however finally established by Lord Ellenborough, C.J., in *Potter v. Brown*:—'The bankruptcy and certificate would have been a discharge of the debt in America, and 'it must by the Comity of the Law of Nations be the same here.' This was followed, in *Quelin v. Moisson*, *Gardiner v. Houghton*; and in *Clerke v. Emery* at Nisi Prius.

**Chapter X.** 'The general form in which the doctrine is expressed, seems to preclude any consideration of the question between what parties it is made : whether between citizens, or between a citizen and a foreigner, or between foreigners. No question as to nationality of parties. Story, § 340.

'The rule is not founded upon the allegiance due from citizens or subjects to their respective governments, but upon the presumption of law that the parties to a contract are connusant of the laws of the country where the contract is made.' (Story—Conflict of Laws, § 340.)

But the first question always to be considered is, whether the foreign discharge is absolute in the country where it was given. Foreign discharge to be absolute.

*Quelin v. Moisson.*  
1 Knapp.  
266n.

Thus, in *Quelin v. Moisson*, the Privy Council held that a bankrupt, discharged under the laws of France, could not be sued in England either for a debt proved under it, or for a debt not proved under it.

Before coming to a decision, the following questions were put to a French advocate :—

- i. Could a person whose property had passed to the Syndics under the law '*de la faillite*,' afterwards be sued by any creditor who had proved his debt before the Syndics?
- ii. Did he lose this protection by a sentence '*par contumace*' as a fraudulent bankrupt?

The answers were :—

- i. He could not be sued even by one who had not proved.
- ii. The sentence '*par contumace*' did not give any creditor a new right to sue.

So, if there is not a complete discharge of his effects as well as of his person, it will not be recognised as a discharge in any other country.

*ex pte Burton.*  
3 M. D. &  
D. 364.

In *ex parte Burton*, this question was raised as to a composition in Holland : In that country proceedings are adopted similar to the *cessio bonorum* among the Romans, by which the debtor is only exempt from imprisonment, his debts remaining until fully paid. The composition was therefore held not to have discharged the obligation. Discharge equivalent to *cessio bonorum* not recognised.

But

*β. Where the discharge is by the courts of a country not the country of the contract,* Discharge by country not of contract.

the question is very difficult of solution :—Is an obligation, contracted in one country, extinguished by a discharge under the laws of another country?

*Westlake.*  
Comity  
should  
declare  
obligation  
extin-  
guished.

'There seems to be no juristic principle,' says Westlake, **Chapter X.**  
'which compels an affirmative answer. But the case is eminently  
'one for the application of comity between those nations which  
'have instituted such discharges in their respective systems of law.  
'The maxim that they are granted by the jurisdiction of the  
'debtor's domicile becomes a part of the knowledge with which  
'men are presumed to contract.'

*Story,*  
§ 342.  
The  
obligation  
is not ex-  
tinguished.

But Story contends for the opposite doctrine, namely, 'that a  
'discharge of a contract by the law of a place where the contract  
'was not made. or to be performed, will not be a discharge of it in  
'any other country.' [Conflict of Laws, § 342.]

The authorities in support of Story's proposition are, Bell's  
Commentaries [5th ed: II. § 1267, pp: 688-692]; Burge's Com-  
mentaries on Colonial and Foreign Law [III. pt: 2, chap: 22,  
pp: 924-929]; and the following cases:—

*Quin v. Keefe*<sup>1</sup>

*Smith v. Buchanan*<sup>2</sup>

*Lewis v. Owen*<sup>3</sup>

*Phillips v. Allan*<sup>4</sup>

*Bartley v. Hodges*<sup>5</sup>

and the Scotch case *Rose v. McLeod*.<sup>6</sup>

Of these, the most important is *Smith v. Buchanan*: The con-  
tract was entered into in England: the discharge was under an  
Insolvent Act in Maryland, U.S.: Lord Kenyon held that the  
discharge was no bar to a suit upon the contract in the English  
courts:—'It is impossible to say that a contract made in one  
'country is to be governed by the laws of another. It might as  
'well be contended that, if the State of Maryland had enacted  
'that no debts due from its own subjects to the subjects of  
'England should be paid, the plaintiff would have been bound by it.  
'This is the case of a contract lawfully made by a subject in this  
'country, which he resorts to a Court of Justice to enforce; but  
'the only answer given is, that a law has been made in a foreign  
'country to discharge these defendants from their debts on con-  
'dition of their having relinquished all their property to their  
'creditors. But how is that an answer to a subject of this  
'country, suing on a lawful contract made here? How can it be  
'pretended that he is bound by a condition to which he has given  
'no assent, either express or implied?'

Discharge  
absolute if  
foreign  
creditor has  
proved.

If however the foreign creditor has proved under the bank-  
ruptcy, in other words if he has claimed the benefit of the law  
under which the estate has been administered, and has received

<sup>1</sup> 2 H. Bl:

553.

<sup>2</sup> 1 East 6.

<sup>3</sup> 4 B. &

Ald: 654.

<sup>4</sup> 8 B. & C.

477.

<sup>5</sup> 30 L. J:

Q. B. 352.

<sup>6</sup> 4 Shaw &

Dun: 308.

*Smith v.*

*Buchanan.*

1 East 6.

**Chapter X.** his share of the bankrupt's property, then the discharge will be binding on him. (*Phillips v. Allan.*)

*Phillips v. Allan.*  
8 B. & C.  
477.  
*Wolff v. Oxholm.*  
6 M. & S.  
92.

Thus, in *Wolff v. Oxholm*, a receipt in accordance with an arbitrary ordinance made by the government of Denmark pending hostilities with Great Britain, specifying a rate at which debts owing by Danes to Englishmen were to be paid, was held to be no answer to an action here against the Dane for the debt; the ordinance not being conformable to the usage of nations.

Story thus extends the doctrine:—‘If a state should by its own laws provide that a discharge of an insolvent debtor under its own laws should be a discharge of all the contracts, even of those made in a foreign country, its own courts would be bound by such provisions. But they would or might be held mere nullities in every other country’ [Conflict of Laws, § 348].

Extension  
of doctrine.  
*Story.*  
§ 348.

Upon this point therefore the two great and learned writers upon the subject are in opposition to each other. Westlake indeed has gone to the extent of asserting that ‘there seems to be some advance towards the establishment of the comity’ he contends for: and he takes the case of *Edwards v. Ronald* before the Privy Council, as finally establishing the doctrine.

*Edwards v. Ronald.*  
1 Knapp.  
259.

But *Edwards v. Ronald* is one of a class of cases which apparently go some length towards supporting this principle, but which were explained in *Bartley v. Hodges*, three years after Mr Westlake's book appeared; and again in *Ellis v. McHenry*.

Discharge  
under Act  
of United  
Kingdom  
absolute  
throughout  
United  
Kingdom.

*Bartley v. Hodges.*  
30 L. J.  
Q. B. 352.  
*Ellis v. McHenry.*  
L. R. 6  
C. P. 228.

The Privy Council held that a certificate of conformity obtained under a commission of Bankruptcy in England was a bar to an action for a debt contracted by the bankrupt in Calcutta previous to his bankruptcy; although the creditor had no notice of the commission, and was resident in Calcutta.

*Lynch v. McKenny.*  
cit: 2 H.  
Bl: 554.

In *Lynch v. McKenny*, a defendant who was sued in England for a debt contracted in Ireland was considered as discharged by an English certificate.

*Sidaway v. Hay.*  
3 B. & C. 12.

So in *Sidaway v. Hay*, a debt contracted in England by a trader residing in Scotland, was held to be barred by a discharge under a sequestration in conformity with 54 G. III. c. 137; in like manner as debts contracted in Scotland.

The principle upon which these cases proceeded was pointed out by Bayley, J., in *Phillips v. Allan*, and his explanation was approved in the two recent cases mentioned above:—‘A discharge of a debt pursuant to the provisions of an Act of Parliament of the United Kingdom, which is competent to legislate for every part of the kingdom, and to bind the rights of all persons

‘residing either in England or Scotland, and which purports to  
‘bind subjects in England and Scotland, operates as a discharge  
‘in both countries.’ Chapter X.

Discharge  
of country  
with  
paramount  
jurisdiction.

And by Bovill, C.J., in *Ellis v. McHenry* :—‘Where the discharge is created by the legislature or laws of a country which has paramount jurisdiction over another country in which the debtor’s liability arose, such a discharge may be effectual in both countries. This is only consistent with justice in the case of bankruptcy, as the debtor is thereby deprived of the whole of his property wherever it may be situate, subject to the special laws of any particular country which may be able to assert a jurisdiction over it. In the case of the legislature of the United Kingdom making laws which will be binding upon her colonies and dependencies, a discharge either in the colony or in the mother country may by the Imperial legislature be made a binding discharge in both, whether the debt or liability arose in one or the other; and a discharge created by an Act of Parliament here would clearly be binding upon the courts in this country, which would be bound to give effect to it in an action commenced in the English courts.’

*Ellis v.  
McHenry.*  
L. R. 6  
C. P. 228.

Case of  
colonial  
discharge  
binding in  
England by  
statute of  
U.K.

In *Philpotts v. Read* we have an instance of a colonial discharge being made binding in this country by an Act of the Imperial Parliament: an insolvent’s certificate under the English Statute constituting the High Court in the colony (49 G. III. c. 27) was pleaded in bar to an action in England for a debt contracted in England prior to the insolvency: the eighth section expressly provided ‘that a certificate obtained under a declaration of insolvency in Newfoundland, shall, when pleaded, be a bar to all suits for debts contracted in Newfoundland and in Great Britain prior to the insolvency.’

*Philpotts v.  
Read.*  
1 B. & B.  
294.

49 G. III.  
c. 27, s. 8.

But not by  
colonial  
statute.

But a colonial act, even though made with the sanction of the Imperial Parliament, will not have effect out of the colony. (*Bartley v. Hodges*, Romilly, M.R. *Townsend v. Early*.)

*Bartley v.  
Hodges.*  
30 L. J.  
Q. B. 352.  
*Townsend  
v. Early.*  
3 De G. &  
J. 23.  
*Ferguson v.  
Spencer.*  
30 L. J.  
C. P. 20.

In *Ferguson v. Spencer*, the right to sue in an English court on an English contract was held to pass to the assignees under an Irish Bankruptcy Act; ‘the Act being that of the Imperial Parliament.’

Scotch  
decisions.

Of the Scotch cases the most important are *the Royal Bank of Scotland v. Cuthbert* (or *Stein’s case*), and *Selkirk v. Davis*; the Court of Session held that the commission of bankruptcy vested the personality of the bankrupt in the assignees wherever

*Royal Bk:  
v. Cuthbert.*  
1 Rose, 462.  
appdx;  
*Selkirk v.  
Davis.*  
2 Rose 291.



**Chapter X.** situate : And in the former case we find that the Court were also unanimously of opinion that the English certificate was a complete discharge of every debt that could be proved under the commission whether English or Scotch. But since foreign debts may be proved under the English bankruptcy, they would appear to be included in this decision ; and Mr Westlake evidently assumes that such was the meaning of the court, since he says that the case is overruled by *Rose v. McLeod*. If the court meant to confine this expression of opinion merely to English or Scotch debts, then it falls within the same principle as *Ferguson v. Spencer*. And since Lord Meadowbank was one of the judges both in *Stein's case* and in *Rose v. McLeod*, it may be presumed that this is the correct interpretation of the decision.

In *Rose v. McLeod*, a debt contracted and payable in Berbice was held not to be discharged by a certificate under an English commission of bankruptcy.

In *Colville v. James*, the title of the assignee to the property and his right to sue was recognised.

In *Young v. Buckel*, it was held that the subsistence of an English adjudication in bankruptcy was a good ground for the recall of a sequestration afterwards awarded in Scotland.

In *Goetze v. Aders*, citing *Strother v. Read* and *Maitland v. Hoffman*, the same principle was laid down in another form : the mercantile sequestration of a bankrupt in a foreign country renders a subsequent award of sequestration in Scotland incompetent.

In *Phosphate Sewage Co. v. Lawson*, the rule was adopted that the court in which bankruptcy proceedings are pending has exclusive jurisdiction, and that no moveable property can be touched except through those proceedings and by orders of that court.

The doctrine that an obligation is not destroyed by a discharge under the laws of a country not the country of the contract, with the exception as to British Colonies, may be said to be now completely established. Doctrine absolutely settled.

If the title of the assignee is universally recognised, as it is ; if creditors will be sent to prove in the foreign bankruptcy, as in many countries they will be ; if, where there are concurrent bankruptcies, the rule of priority will be observed, as it will be ; it is difficult to understand why the last step, the universal recognitions of the discharge, should not also be accepted : in fact the second step, sending creditors to prove in the foreign bankruptcy independently of an enquiry as to where the contract was entered

*Rose v. McLeod*,  
4 Shaw &  
Dunlop, 308.

*Ferguson v. Spencer*,  
10 L. J.  
C. P. 20.

*Colville v. James*,  
Sc: Ses:  
Ca: 3rd Ser:  
1, 41.  
*Young v. Buckel*,  
id: 11,  
1077.

*Goetze v. Aders*,  
id: 4th  
Ser: 11., 153.

*Phosphate  
Sewage Co.  
v. Lawson*,  
id: V, 1125.

into, would seem to show, that in those countries at least where Chapter X.  
such a rule obtains, the rule will also obtain that the discharge —————  
will be accepted as absolute.

Result.

Hypo-  
thetical case.

As the law of England stands however we have this result :—

a contract entered into in France :—a discharge under the Bankruptcy Laws of England :—in an action in the French courts on the contract, they will be justified in refusing to acknowledge the English discharge.

All  
obligations  
discharged  
in courts  
of country  
granting  
discharge.

But, since foreign debts are proveable under the English Bankruptcy Laws, and the discharge and certificate under those laws protect the goods and the person from all debts proveable under the commission (*Davis v. Shapley*) ; in the English courts the debtor will be held to be discharged from all his debts and obligations whether English or foreign. Thus in *Armani v. Castrique*, Pollock, C.B., said :—‘ I have no doubt that if this were ‘ a foreign contract, the defendant’s bankruptcy would afford an ‘ answer to the action. Inasmuch as the goods of a bankrupt all ‘ over the world are vested in his assignees, he is discharged by his ‘ certificate. It would be a manifest injustice to take the property ‘ of a bankrupt in a foreign country, and then to allow a foreign ‘ creditor to come and sue him here. The English certificate is an ‘ answer to every contract by the bankrupt made in any part of ‘ the world.’ This was adopted by Kelly, C.B., delivering the judgment of the Privy Council in *Gill v. Barron*. Both are *obiter dicta* ; it is clear however that both learned judges referred only to actions on the contracts in the English courts.

*Davis v.*  
*Shapley.*  
1 B. & Ad.  
54.  
*Armani v.*  
*Castrique.*  
14 L. J.  
Ex: 36.

*Gill v.*  
*Barron.*  
L. R. 2  
P. C. 157.

Result.

Continuing the hypothetical case suggested above, the further result is, that

Hypo-  
thetical case  
continued.

in an action in the English courts on the same contract, they will be justified in acknowledging the English discharge.

But, supposing an action brought in the French courts, and judgment recovered : and then an action in England on the French judgment : it seems that the English courts could not do otherwise than give effect to it ; for it has proceeded strictly in accordance with the principles of International Law recognised by our courts : namely, that a discharge by the laws of a country which is not the country of the contract does not release the debtor from the obligation.

**Chapter X.** England therefore is one of those States 'by its own laws Story's extension of the doctrine applies to England. c/; p. 343. 'providing that a discharge of an insolvent debtor under its own 'laws is a discharge of all the contracts, even of those made in a 'foreign country. Its own courts have declared this to be the law.' Therefore such judgments would or might be held mere nullities in every other country.

To complete the illustration afforded by the hypothetical case :—

The action brought on the contract in England: the defendant's plea of bankruptcy and discharge held good: Hypothetical case concluded. The French courts would be justified in refusing to acknowledge such judgment, and in allowing the plaintiff to recover on his contract.

*Odwin v. Forbes.*  
1 Buck  
C. B. 57.

The case of *Odwin v. Forbes* must be noticed, as it is the only one in which the opposite doctrine appears to have been acted upon, and a foreign discharge admitted. To a suit instituted in the Dutch colonial court at Demerara for the recovery of the balance of account for sugar consigned to and received by the defendant in London, he pleaded an English bankruptcy of which the plaintiff had notice, but under which he had not proved. A very careful and elaborate judgment was delivered by the President of the court of Demerara, which was approved in a very marked way by the Privy Council. The judgment concluded thus :—

On the strength of cases and opinions, and on the principle of 'comity and reciprocity which had been shewn to exist between 'England and Holland in matters of bankruptcy, and still further 'on the grounds that the effect of the certificate ought in justice 'to be co-extensive with the assignment, and that if foreign courts 'allowed the assignees under the English commission to strip the 'debtor of his property by giving effect to the assignment within 'their jurisdiction, they were bound in justice to give equal effect 'to the certificate, and not leave him liable to the actions of 'the foreign creditors.' The English certificate was admitted accordingly, and held to discharge the plaintiff's claim. Judgment of President of Court of Demerara.

*Edwards v. Ronald.*  
1 Knapp:  
259.

It has generally been assumed whenever this case has been quoted that it falls in the same class as *Edwards v. Ronald*, because Demerara had at that time been ceded to England: but the learned President did not consider the question of an Imperial discharge; Dutch law having been secured to the colonists by the capitulations, he treated Demerara as if it had still been part of Holland, and so far as the law was concerned, a foreign country.

Did not proceed on Imperial discharge.

Mr Chancellor Kent in *Holmes v. Remsen* [New York] takes the same view on the same broad grounds : but the correctness of his decision was doubted by Chief Justice Parker in *Blake v. Williams* [Massachusetts], who held that an attachment in America before notice of an English assignment was valid as against the assignee.

*Holmes v. Remsen*,  
4 Johns;  
Ch: 460.  
*Blake v. Williams*,  
23 Mass;  
Rep: 285.

It must however be remembered that whereas the assignment deals with the property of the debtor, the discharge affects the property of his creditors, which consideration might be sufficient to account for any difference in the effect accorded to them.

Application  
of principle  
of *Heather v. Webb*  
to  
foreign  
judgments.

In *Heather v. Webb*, the Court of Common Pleas held that an action could not be maintained on a promise to pay a debt from which the debtor had been released by a discharge in bankruptcy.

*Heather v. Webb*,  
2 C. P. D. 1

The principle of the case being that the English release from obligation is absolute, it is presumed that the same principle will apply to foreign bankruptcies when the discharge by the foreign court is also absolute.

#### IV. STATUS OF THE BANKRUPT.

We have hitherto dealt only with the status of the assignee.

We now come to the status of the bankrupt. It will be noticed that in many of the judgments cited there have been, as in all the other questions of status, references to the country and the court of the domicile. 'The presumption,' said Mr Chancellor Kent in his celebrated judgment in *Holmes v. Remsen* [New York], 'ought to be that justice will be well administered in every civilised country, and in the application of the law to bankrupts that the foreign creditor sent to the bankrupt's domicile for his dividend, will obtain the same measure of justice as the other suitors of the country. It is the presumed will of every person dying intestate, that his moveables, which by a fiction of law have no locality independent of his person, should be brought home and distributed according to the law of his own place. A different rule would be extremely mischievous, and affect the commerce of the country. So it is equally to be presumed to be the understanding of the commercial world, that the funds of the bankrupt should be distributed according to the law of the place where he resided, *animo manendi*, and where the credit was bestowed.'

*Holmes v. Remsen*,  
4 Johns;  
Ch: 460.

*Kent*.

Jurisdiction.

But it is very evident, as in the former cases, that if domicile is used in its strict sense, it is not an accurate statement of the law to say that the courts of the domicile, and the law of the domicile

**Chapter X.** alone have jurisdiction in bankruptcy, for we are not dealing here with a natural status. What is involved in the word domicile used in its strict sense, may be gathered from the decision in *Jopp v. Wood* : a person going to a country to reside there for trading or making a fortune, does not, by length of residence alone, gain a domicile there. If it was found expedient in former cases to cut this down to matrimonial home or usual residence, it is all the more necessary to adopt a similar limitation in the case of bankruptcy: in England as we have seen usual residence has again been taken as the foundation of jurisdiction, and this may now be said to be the accepted rule on the subject.

*Jopp v.*  
*Wood.*  
34 L. J: Ch:  
212.

The question of jurisdiction settled, although the fact of bankruptcy depends on the principles we have just discussed, the status of the bankrupt is not recognised beyond the territorial limits of the country in which the decree has been made: in other words, the courts of one country do not regard in any way the personal consequences of bankruptcy in another country. In some States bankruptcy is regarded as a criminal act, and the debtor liable to imprisonment; but this is a matter concerning the State alone, provided by it as a deterrent to its subjects; it therefore can have no extra-territorial effect.

Personal  
status of  
bankrupt  
not  
recognised  
inter-  
nationally.

*Gill v.*  
*Barron.*  
L. R. 2  
P. C. 157.

This principle was applied in *Gill v. Barron* where there had first been proceedings in Barbadoes, and afterwards other proceedings in England, after which the bankrupt obtained his discharge. The Privy Council decided that on his return to the Barbadoes, he could still be prosecuted for frauds and offences against the law of Insolvent debtors in those islands.



## SUMMARY OF THE TENTH CHAPTER.

## Chapter X.

A division of status made for the purposes of the subject : and the general rules applicable to each, stated shortly : judgments of status are judgments *in rem*. 271

## MARRIAGE. LEGITIMACY. DIVORCE.

The general principle is that capacity to marry depends upon the *lex domicilii*. 272

a familiar instance of this is a marriage abroad of an Englishman with his deceased wife's sister ; or a marriage in England of first cousins domiciled in Portugal : both are invalid, and should be held invalid in all countries. 272

The question raised in *Simonin v. Mallac* was invalidity on account of the non-performance of a ceremonial act. 273  
the general principle however has been doubted not only by civilians but by judges, but on the whole it seems to be now firmly settled. 274

Legitimacy as a general rule follows the *lex domicilii*. 275  
as to legitimacy *per subsequens matrimonium*, it is immaterial where the subsequent marriage takes place : but this has been limited by the rule that the domicil is to be that of the father at the time of birth, and not that at the time of the subsequent marriage. 276

nevertheless in order to take lands by descent according to English law, the heir must be born in actual matrimony. 276  
With regard to divorce the old theory was that English marriages were indissoluble by foreign courts, but this has now been completely swept away. 276

Another theory is that of the *lex loci contractus* ; but this has also been disapproved by the House of Lords. 276

The rule now accepted is that of the *lex domicilii*, except in the matter of the marriage ceremony when the rule is still that of the *lex loci contractus* : a marriage solemnized abroad must be according to the law of the country : if invalid there

Chapter X.

on account of the non-observance of the ceremonial law, it will be held invalid here. 277

The wife's domicile is that of her husband; 'domicil of parties' means therefore the domicile of the husband; but there are some doubts whether this rule holds universally, especially where she has been deserted by her husband; certainly not when this domicile is merely to found jurisdiction: she cannot however acquire a new domicile but retains that of her marriage; this domicile also regulates the validity of marriage. 279

No man can be without a domicile. 280

The rule *lex domicilii* being established, the different cases are considered. 280

I. *Marriage in England and decree abroad.*

Where the husband is a foreigner and domiciled abroad the decree will be recognised. 280

*Simonin v. Mallac* considered. 281

Where the husband is English and domiciled in England, the general rule is that the decree will not be recognised. 283

the question of Scotch divorces considered. 283

*Lolley's case* and *Shaw v. Gould* are identical: they decide that where the foreign court assumes jurisdiction on account of mere residence, or on account of a residence for a definite period to which the name 'domicil' is applied, the decree will not be recognised. 283-285

the meaning of the phrase '*in fraudem legis*.' 284

in questions of divorce the rule *lex domicilii* means the domicile at the time of the matrimonial wrong. 285

a difficult question arises where the residence is not *in fraudem legis*. The Lords thought that a divorce in such a case would be recognised: but in *Pitt v. Pitt*, a Scotch appeal, they decided that such residence would not give the Scotch courts jurisdiction. 286

It is therefore important to determine what amount of residence or domicile abroad will be held sufficient in English law to support a foreign decree: the better opinion seems to be that the establishment of the matrimonial home is enough. 287

Where the husband is a foreigner domiciled in England the question is doubtful, on account of another principle sometimes recognised, that allegiance is not waived by domicile. 288

The same doubt arises where the husband is English but **Chapter X.**  
domiciled abroad. 288

II. *Marriage abroad and decree abroad.*

All the foregoing considerations apply to the different cases arising under this head. 288

III. *Decree in England.*

Where the marriage was performed either in England or abroad and the decree is to be pronounced in England, the general question of the jurisdiction of the English Divorce Court is raised. 288

The rule as to citation on a respondent out of the jurisdiction differs from that in use in the Common Law Courts. 289  
The first difficulty arises in the case of an Englishman domiciled abroad; but the rule of allegiance seems to have been adopted and a divorce pronounced. 289

The real difficulty arises however when the husband is a foreigner domiciled abroad. 289

*Niboyet v. Niboyet* considered. 289

As in the converse case the rule *lex domicilii* has not been adopted strictly, but that of the matrimonial home; where this is in England the court will pronounce a decree. 291

the earlier cases considered. 291

the court will not decree restitution of conjugal rights against a respondent who is out of the jurisdiction. 293

The citation may be served out of the jurisdiction in all cases except in a suit for restitution of conjugal rights. 293

In some cases service will be dispensed with altogether. 293

Note on Mrs Bulkley's case and the French law. 294

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The two forms of status involved in a finding in lunacy, that of the lunatic and that of the curator. 296

Consideration of the question what country is entitled to find a person lunatic. 296

the English principle seems to be that of residence. 296

Foreign finding in Lunacy recognised in both respects in England; but further enquiry requisite here to obtain protection of Lord Chancellor. 297

Foreign *curator bonis* may apply for transfer of lunatic's money in funds, but not of realty. 297

in the case of a foreigner as of right; 297

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in the case of an English subject, reference to the master directed, and application may be granted, if report is favourable: 297

It is however usually limited to the dividends, and will not be made as to the corpus unless strong reason is shewn. 297  
reasons assigned for not granting transfer, even of the dividends, although report is favourable; it is a question of discretion. 298

Lunacy Regulation Act, 1853 (16 & 17 Vic: c. 70), ss: 45, 85, 141, 147. 298. 299

*re Sottomayor* considered. 299

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The different forms of status involved in guardianship. 302

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the English principle seems to be that of residence. 302

Foreign appointment usually followed in England. 303

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ground for not following the appointment. 305

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**PROBATE AND ADMINISTRATION.**

The question of status involved in a grant of probate and administration is that of the executor or administrator: this depending on the status of the deceased as to his testacy or intestacy, depends on the law of the domicile of the deceased. The capacity to make a will: the fact whether a will has been made or not: the validity of the will when made: and the construction of it all depend on the law of the domicile alone. 307

Lord Kingdown's Act altered the general rule, that a will to be valid must be made according to the law of the domicile, with regard to wills of British subjects made abroad. 308

Probate or administration will therefore be granted in this country to the person entitled to it by the *lex domicilii*. 309

The domicile is that at the time of death : except as to capacity when it is that of the time of making the will. 309

Where there is a judgment of the court of the domicile as to capacity, validity, or construction it will be followed in this country. 310

But where there has been a grant of probate or administration by that court, the status of the executor or administrator will not be recognised so as to allow him without more to administer personally in this country belonging to the deceased. 310

that can only be done by grant in some form by the English Probate Court. 311

The status however will be recognised as existing in the foreign country, and the decree will be followed by clothing the foreign executor or administrator with an auxiliary grant, limited to the property in this country. 311

The form of the grant must depend on English law : this is an example of the rule *lex fori*: 311

The Prerogative Courts hesitated as to the form of the grant, whether it should correspond with the foreign grant in all cases ; but the Probate Court has power under s. 73 of the Probate Act. 312

the character of the representative will therefore conform to English law. 314

The case of the Duchess of Orleans considered : foreign grant to a minor : 314

the same rule in fact applies, the minor being allowed to select his next of kin to take the grant on his behalf. 315

It is not essential that there should be actual probate abroad : any proceeding corresponding to our grant will be followed in the same way. 316

Where there are concurrent proceedings, the English court will await the decision abroad : 317

and if probate has already been granted here, it will be varied to conform to a later grant abroad. 317

The English grant will also be limited in accordance with the foreign law or with a foreign decree. 318

the subject of translations considered. 319

Prior to reducing assets into possession, whether by action or petition, or in any other way, the English grant is necessary ;



Chapter X.

but it seems it is not necessary if there has been a judgment abroad on the debt : or if the debt has passed to the administrator in his own right. 319

The English grant being necessary, it is necessary also for the English property to be administered here. 321

The succession to the property will also be governed by the law of the domicil. 322

With regard to wills of realty, every question is governed by the *lex rei sitæ*, except, perhaps, the fact by which capacity or incapacity is to be determined. 323

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a foreign adjudication and assignment is recognised in England whether there has been notice of the foreign proceedings or not, either to stay an English action to attach property ; or in an action brought by the foreign trustees. 326  
the doctrine applies to personalty only. 328

peculiar rights of foreign trustees will be recognised. 326

assumed jurisdiction in bankruptcy. 329

the rule of English jurisdiction considered. 329

acts of bankruptcy which may be committed out of the jurisdiction. 329

jurisdiction to wind up foreign companies, depends mainly on some part of the business being carried on in this country. 330  
an English adjudication should be recognised by foreign courts ;—but if it is not, and property is attached, the English courts will abide by the decision and respect the judgment : 331

nevertheless if the attaching creditor be English, he will be held to have recovered to the use of the trustees, with or without notice : 332

but otherwise if the creditor be a foreigner, with or without notice. 332. 334

*Phillips v. Hunter* considered. 333

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Where the concurrent proceedings are either both joint or both separate, the rule of priority is adopted. 337

Where one is joint, and the other separate, the same rule **Chapter X.** should also be applied in determining the respective rights —  
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no question as to nationality, but only as to absoluteness of discharge : 341

a discharge, similar to the *cessio bonorum* of the Romans is not recognised out of the country. 341

when the discharge is by a country not the country of the contract, the doctrines of Story and Westlake are in opposition, but authority supports Story : such a discharge is not recognised : 342

but that it should be recognised seems a logical deduction from the rules already accepted. 345

some countries declare that a discharge under their laws dissolves in their own courts all obligations wherever contracted : 343

as for example, England : such judgments will not be recognised by other countries. 347

a discharge under an Act of the Imperial Parliament is absolute in every part of the United Kingdom. 343

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## CHAPTER XI.

Chapter  
XI. STATUTORY ENACTMENTS WITH REGARD TO  
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WE now propose to consider certain statutory enactments dealing with judgments, decrees, or orders rendered in one part of the United Kingdom, and their enforcement in the other parts.

These statutes relate to judgments of the Common Law Courts, judgments of Inferior Courts, company orders, inquisitions in lunacy, grants of probate, and orders in bankruptcy. Chapter  
XI.

## I. THE JUDGMENTS EXTENSION ACT, 1868.

[31 & 32 Vic. c. 54.]

In 1834, Lord Brougham, C., in the case of *Lord Portarlington v. Soulby* said that the question of enforcing Irish judgments here and *vice versa* was at the then present moment the subject of legislative consideration. *Portarlington v. Soulby.*  
3 My. & K.  
104.

31 & 32 V.  
c. 54.

In July, 1868, the Judgments Extension Act was passed, 'to render judgments or decreets obtained in certain courts in England, Scotland and Ireland respectively effectual in any other part of the United Kingdom.' The following is a short epitome of the Act.

ss: 1, 2, 3.  
Registration  
of judgments.

Registers are kept by the Senior Masters of the Common Law Courts in each country for the registration of judgments obtained in the courts of the other countries. A certificate of the judgment (in the form given in the Schedule to the Act), signed by the proper officer of the court where such judgment has been obtained or entered up, or by the extractor of the Court of Session, entered on one of these registers, has the same effect and may be proceeded on as a judgment of the court in which it is so registered. The costs of obtaining and registering this certificate may be recovered as if they were part of the original judgment. But after twelve months from the date of the judgment leave to register has to be obtained from the court, or a Judge of the court where it is sought to register the certificate.

Costs of  
certificate.

After twelve  
months  
application  
necessary.

Effect of  
stay of  
execution.

In the case of a Scotch decret, where a note of suspension has been passed or sist of execution granted by the Court of Session, if a certificate signed by the Clerk to the Bill Chamber of the Court of Session be produced, execution on the registered certificate shall be stayed until the suspension is repelled, or the sist has been recalled or has expired. [ss: 1, 2, 3.]

It is presumed that a certificate of a stay of execution granted by an English or an Irish Court would operate in a similar manner.

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XI.

The registered certificate, in so far as relates to execution under the Act, is under the control of the court in which it is registered in the same manner as one of its own judgments. [s. 4.]

s. 4.  
Registered  
certificate  
under  
control of  
court.  
s. 5.  
Security for  
costs not  
required in  
proceedings  
on registered  
certificate.

In proceeding on the registered certificate, the plaintiff, though residing in a different part of the kingdom, is not required to find security for costs in respect of such residence, except on special grounds. [s. 5.]

The registration under the Act is intended entirely to supersede any action on a judgment which might be registered: if such an action be brought, costs will not be allowed unless by order of the court. [s. 6.]

s. 6.  
Action on  
judgment  
superseded.

The Act does not apply to any decret pronouncd in absense in an action proceeding on an arrestment used to found jurisdiction in Scotland. [s. 7.]

s. 7.  
Scotch  
arrestment.

The same principle would seem to apply to a judgment in the foreign attachment in the city of London. And further, a judgment to be capable of registration must be for debt, damages, or costs alone, so that 'equity judgments are excluded, and all 'judgments and decrees *ad facta præstanda* or of the nature of 'prohibitions or injunctions' (*Wotherspoon v. Connolly*); so also judgments in actions for the recovery of land, and in probate and divorce suits. To enforce such judgments, therefore, as are not within the Act an action must be brought, and it would appear that, as heretofore, the judgment is treated in the same manner as one pronounced by a foreign tribunal.

Foreign  
attachment.  
Judgments  
other than  
for debt,  
damages,  
or costs.

[The act is given *in extenso* in the Appendix. The forms will be found in Chitty's Forms, 11th ed: p. 359 *et seq.*]

One of the immediate results of the Act has been the doing away with a defendant's right to require a plaintiff residing in another part of the United Kingdom to find security for costs in respect of such residence: as we have seen in the chapter on 'Security for costs' [chapter v.], a plaintiff resident abroad is called upon to give security 'for this reason, that if a verdict be given against the 'plaintiff he is not within reach of our law so as to have process 'served upon him for the costs.' (*Buller, J., Pray v. Edie.*) For the purposes of jurisdiction Scotland and Ireland have always been considered foreign countries, and therefore prior to 1868 the rules as to security were equally applicable to plaintiffs residing in those countries. But since the passing of the Act, that reason, in so far as it related to the United Kingdom, has completely ceased, because in lieu of the security the defendant if successful is entitled, by registering his judgment, to invoke the assistance of the court

Effect of  
Act.  
Security for  
costs gene-  
rally done  
away with as  
to plaintiffs  
in any part  
of United  
Kingdom.

*Wothers-  
spoon v.  
Connolly.*  
Sc: Sess:  
ca: 3rd Ser:  
1X. 310.

*Pray v.  
Edie.*  
1 T. R. 267.



to enforce his claim for costs. (Blackburn, J., *Raeburn v. Andrews*.) In the Schedule to the Act there are printed two forms of certificates, the first for the plaintiff, to be used in the event of his obtaining judgment; the second for the defendant, to be used for the recovery of the costs of the suit where judgment has been given in his favour. Both parties are thus brought within the jurisdiction of the court in which the judgment has been registered, and upon the registered certificate that court can issue process against plaintiff or defendant, as the case may be.

Certificates.

In Chancery suits security still required.

But this rule is only applicable in those actions to which the Act relates: and therefore in Chancery suits and in others to which the Act does not apply security must still be given: thus in *re East Llangynog Lead Co.*, a petition to wind up a Company presented by a shareholder residing in Scotland, security was ordered. (Jessel, M.R.)

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*Raeburn v. Andrews.*  
L. R. 9  
Q. B. 118.

*re East Llangynog Co.*  
W. N. 1875,  
p. 81.

The decision in *Raeburn v. Andrews* was based upon the general effect of the Act, and not upon section 5. The provision in that section was inserted 'from excess of caution.' It was probably introduced to meet the case mentioned in the proviso at the end of section 1, where some costs may have to be incurred in obtaining the leave of the court or judge before the certificate can be registered. (Quain J.)

Irish decisions.

The decisions in the Irish Courts exhibit a divergence of opinion upon this point. Of four cases within one year, two have followed the above decision (*White v. Carrol*; *York v. McLaughlin*), and two have abided by the old practice of insisting on the security for costs being given (*Clarke v. Croker*; *Corner v. Irwin*). In *Yorke v. McLaughlin* the 'special grounds' mentioned in section 5 were held to mean the extreme cases only of insolvency or absconding; and the fact that the plaintiff was so embarrassed as to be unable to pay a judgment debt obtained against him previously by the defendant, otherwise than by small instalments, was not considered sufficient to entitle the defendant to security.

*White v. Carrol.*  
Ir: Rep: 8  
C. L. 296.  
*York v. McLaughlin.* ib: 547.  
*Clarke v. Croker.*  
ib: 318.  
*Corner v. Irwin.*  
ib: 504.

Forms in Schedule to be adhered to strictly.

Under the powers given by section 4, the judges, in *Port v. Scannell*, set aside a registration in which there was not a substantial adherence to the form of certificate in the Schedule to the Act. The certificate stated that the judgment was obtained 'in default of appearance,' instead of 'after appearance,' and there was no mention of service on the defendant. From this case and from *Bailey v. Welply*, it would appear that the registration will be set aside for an irregularity on the face of it, but for no other reason. In this latter case it was argued that the

*Port v. Scannell.*  
Ir: Rep: 9  
C. L. 426.

Setting aside registration.

*Bailey v. Welply.*  
Ir: Rep: 4  
C. L. 243.

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judgment described in the certificate as final was not really so, as certain demurrers to some of the pleas were still undecided; there was, in fact, a subsequent order staying all proceedings on the judgment while the demurrers remained undisposed of. Monaghan, C.J., held that the certificate signed by the proper officer must be considered accurate and final. The application to set aside the judgment was wrong, because there was no judgment in the Irish court to set aside; there was only the certificate of the English court, and the application should have been simply to take that certificate off the file.

The benefit accorded to judgment creditors by this Act is very great, bringing as it does the whole of the United Kingdom under one law for the purpose of making the execution of the judgments of any of its Superior Courts as speedy as possible, no matter in what part of the kingdom the judgment debtor may be found:— ‘As nearly as is possible consistently with the differences in the ‘laws and usages of the countries, the decrees of the courts of ‘one country are to receive in the other an effect equivalent to its ‘own decrees.’ (Lord President. *Wotherspoon v. Connolly*.) But it is surprising to think that the Act was not passed till the year 1868, that it was *in græmio senatûs* for thirty-four years; that the only method, prior to that year, of enforcing an English judgment in Scotland or Ireland should the judgment debtor have removed there, having no property in this country on which execution could issue, was by the cumbersome proceeding of following him and bringing an action against him upon the judgment as upon a foreign judgment, wherever he might be found. So long ago as 1855, our Australian colonies had introduced into their statute books a provision known as the ‘Australasian Creditors Act,’ to give further remedies to creditors against persons removing from one Australian colony to another, whereby a memorial of a judgment under the seal of the Superior Court of one colony, by being filed in the Superior Court of another colony becomes a record of that colony, upon which execution may issue in the usual way.

The  
Australasian  
Creditors  
Acts.  
[cf: pp: 396.  
398.]

In 1883, the colony of New Zealand made another step forward. The 27th section of the New Judicature Act [cf: p. 399] takes the place of the old Australasian Creditors Act, and extends the benefits of registration to judgments ‘whereby any sum of money ‘is made payable,’ obtained in ‘any court of any of Her Majesty’s ‘dominions.’

New  
Zealand Act.

The other groups of colonies have not yet copied this wise enactment; but the time cannot be far distant when not only

*Wotherspoon v. Connolly.*  
Sc: Sess: ca: 3rd Ser: IX. 310.

isolated portions of the Empire shall possess such a law, but when one Imperial Statute shall bind together all the many courts acknowledging the appellate supremacy of the Privy Council and the House of Lords.

*Scotch  
practice.*

### *Act of Sederunt, 11 July, 1871.*

[passed in pursuance of 'The Judgments Extension Act, 1868.']

- i. That in the extract of a certificate of any judgment obtained or entered up in any of the Common Law Courts in England or Ireland for any debt, damages, or costs, and registered in the books of Council and Session under section 2, the *induciae* of charge shall be fifteen days, as in an extract of a decret pronounced by the Court of Session.
- ii. That, for the registration of each such certificate in the extract thereof, the fees shall be charged which are authorised by Statute 50 G. III. c. 112, to be exacted upon extracts of deeds recorded in the books of Council and Session, and that the same fees shall be charged for each subsequent extract.
- iii. That a fee of 2 shillings shall be paid for each certificate issued under section 3, and no fee-fund dues shall be charged upon such certificates.

## II. THE INFERIOR COURTS JUDGMENTS EXTENSION ACT, 1882.

[45 & 46 Vic: c. 31.]

45 & 46 V.  
c. 31.  
Judgments  
of inferior  
courts.  
s. 2.  
Definition.

The principle of the Judgments Extension Act was in 1882 extended to the judgments of certain Inferior Courts in different parts of the United Kingdom.

The term 'Inferior Court' includes County Courts, Civil Bill Courts and all courts in England and Ireland having jurisdiction to hear and determine civil causes other than the High Courts of Justice: Courts of Petty Sessions and the Court of Bankruptcy in Ireland: Sheriffs' Courts and courts held under the Small Debts and Debts Recovery Acts in Scotland. [s. 2.]

s. 3.  
Grant of  
certificate.

The registrar of the court is to grant a certificate, in the form given in the Schedule, of the judgment after the time for appealing has elapsed, and in the event of the judgment not having been reversed nor execution stayed, on proof that there has been no satisfaction and on payment of the prescribed fee. [s. 3.]

ss. 4, 5.  
Effect of  
registration.

The registration of this certificate is to have the effect of a judgment of the court in which it is registered, and execution is to

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issue upon it as if it were a judgment of that court: the costs of obtaining and registering the certificate are to be recovered as part of the original judgment: but it must be registered within twelve months from the date of the judgment. [ss: 4, 5.]

The registration may be cancelled by the court in which it is registered on proof of setting aside or satisfaction. [s. 7.]

Sections 6 and 8 correspond with sections 4 and 6 of the Judgments Extension Act [*cf.* p. 359.]

The existing limits of local jurisdiction are never to be exceeded. If the judgment of a Scotch Inferior Court cannot by reason of this section be registered in an inferior court in England or Ireland, it may be registered in 'The register of Scotch Judgments' in the High Courts of those countries as under section 3 of the Judgment Extension Act, and such judgment will thereupon come under the provisions of that Act. [s. 9.]

The Act is not to apply to judgments pronounced against any person domiciled at the time of the commencement of the action in any part of the United Kingdom, other than that in which the judgment was pronounced, 'unless the whole cause of action shall have arisen or the obligation to which the judgment relates ought to have been fulfilled within the district of the inferior court which has pronounced the judgment and the summons was served upon the defendant personally within the said district.' And a person 'against whom any judgment to which this Act does not apply is sought to be enforced by registration' may obtain 'a prohibition or injunction, suspension or suspension and interdict' against the enforcement of such judgment or execution or diligence thereon: costs of such application to follow the event. [s. 10.]

[The Act is given *in extenso* in the Appendix.]

The Act of Sederunt in pursuance of this statute has not yet been passed.

s. 7.  
Cancelling  
registration.

ss: 6, 8.  
Registered  
certificate  
under  
control of  
court.  
Action on  
judgment  
superseded

s. 9.  
Existing  
limits of  
local  
jurisdiction  
not to be  
exceeded.

s. 10.  
Rule of  
jurisdiction.

## III. THE COMPANIES ACT, 1862.

[25 & 26 Vic: c. 89, ss: 122, 123, 125.]

The mutual enforcement of English, Scotch and Irish orders made against contributories in any part of the United Kingdom for the payment of calls in the course of winding up any company

English,  
Scotch, and  
Irish orders.  
25 & 26 V.  
c. 89.

over which the court making the order has jurisdiction, is dealt with in sections 122, 123, and 125 of the Companies Act, 1862, upon a principle similar to that of the Judgments Extension Act.

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### 25 & 26 Vic: c. 89, s. 122.

s. 122.  
Orders made  
in England  
to be  
enforced in  
Scotland and  
Ireland.

Any order made by the court in England for or in the course of the winding up of a company under this Act shall be enforced in Scotland and Ireland in the courts that would respectively have had jurisdiction in respect of such company if the registered office of the company had been situate in Scotland or Ireland, and in the same manner in all respects as if such order had been made by the courts that are hereby required to enforce the same ; and in a like manner orders, interlocutors, and decrees made by the court in Scotland for or in the course of the winding up of a company shall be enforced in England and Ireland, and orders made by the court in Ireland for or in the course of winding up a company shall be enforced in England and Scotland by the courts which would respectively have had jurisdiction in the matter of such company if the registered office of the company were situate in the division of the United Kingdom where the order is required to be enforced, and in the same manner in all respects as if such order had been made by the court required to enforce the same in the case of a company within its own jurisdiction.

### s. 123.

s. 123.  
Mode of  
dealing with  
orders to be  
enforced by  
other courts.

Where any order, interlocutor, or decree made by one court is required to be enforced by another court, as hereinbefore provided [by s. 122], an office copy of the order, interlocutor, or decree so made shall be produced to the proper officer of the court required to enforce the same, and the production of such office copy shall be sufficient evidence of such order, interlocutor, or decree having been made ; and thereupon such last-mentioned court shall take such steps in the matter as may be requisite for enforcing such order, interlocutor, or decree of the court enforcing the same.

### s. 125.

s. 125.  
Judicial  
notice to be  
taken of  
signature of  
officers.

In all proceedings under this part of this Act, all courts, judges, and persons judicially acting, and all other officers, judicial or ministerial, of any court, or employed in enforcing the process of any court, shall take judicial notice of the signature of any officer of the Courts of Chancery or Bankruptcy in England or in Ireland, or of the Court of Session in Scotland, or of the registrar of the court of the Vice Warden of the Stannaries, and also of the official seal or stamp of the several offices of the Courts of Chancery or Bankruptcy in England or Ireland, or of the Court of Session in Scotland, or of the Court of Vice Warden of the Stannaries, when such seal or stamp is appended to or impressed on any document made, issued, or signed under the provisions of this part of the Act, or any official copy thereof.

Scotch or  
Irish order  
to be made  
order of  
English  
Chancery  
Court.

The Scotch or Irish order (and it is presumed a foreign order also) is to be made an order of the Chancery Court in England, and not an order of the Bankruptcy Court (*re Hollyford Copper Mining Co.*, followed in *re City of Glasgow Bank*).

*re*  
*Hollyford*  
*Mining Co.*  
L. R. 5  
Ch: 93.  
*re City of*  
*Glasgow*  
*Bank.*  
14 Ch: D.  
628.



Chapter  
XI.

The Irish Master of the Rolls however in *re Hercules Insurance Co.*; thought that it was sufficient to produce an office copy of the order to the Chancery Office without making it an order of that court.

Irish  
decision.

*re Hercules  
Ins: Co:*  
6 Ir: Eq;  
Rep: 207.

Under section 87, the Court has power, when an order has been made for winding up a company under the Act, to restrain any action commenced against the company. The Act applying to all companies in the United Kingdom, Jessel, M.R., held that the court in which the winding up was proceeding had jurisdiction to restrain actions against the company in any other part of the United Kingdom. (*re International Pulp Co.*)

s. 87.  
Injunction  
to restrain  
action in  
any part of  
United  
Kingdom.  
[cf: p. 82.]

*re Inter-  
national  
Pulp Co:*  
3 Ch: D.  
594.  
*re British  
Imp: Corp:*  
5 Ch: D.  
749.  
*re House-  
hold Ins:*  
Co: W. N.  
1878, 26.

A summons in the winding up of a company under sections 100 and 165 on officials out of the jurisdiction may be served by leave of the court in the same way as a writ under Order XI, the time for appearance being limited as provided by the rules of that order. (*re British Imperial Corporation*, followed in *re Household Insurance Co.*)

ss: 100, 165.  
Service of  
summons  
on officials  
out of  
jurisdiction.

### Act of Sederunt, 21 June 1883.

Scotch  
practice.

[passed to regulate procedure under the Companies Act, 1862, s. 122;  
and under the Bankruptcy Act, 1869, s. 73.]

- i. That on production to the Clerk of the Bills of an office copy of any order made by any of the courts aforesaid [under the sections above mentioned] the same shall be registered *in extenso* in a Register to be kept for that purpose in the office of the said clerk on payment of the fee mentioned in the schedule annexed hereto: and the said register shall be open to inspection of all concerned, on payment of the fee mentioned in the said schedule.
- ii. That after registration as aforesaid, the Clerk of the Bills shall append to such office copy a certificate subscribed by him of the registration thereof, in the terms mentioned in the said schedule: and the same being so registered and certified, shall be a sufficient warrant to officers of court to charge for payment of the sums recoverable under such order, and of the expense of registering the same, and to use any further diligence that may be competent, in the same manner as if such order had been a decree originally pronounced in the Court of Session on the date of such registration as aforesaid.

#### Schedule.

Fee for registration of orders	.	.	.	.	.	.	5 shillings
Fee for search in register	.	.	.	.	.	.	2s. 6d.

## IV. THE LUNACY REGULATION ACT, 1853.

Chapter  
XI.

[16 &amp; 17 Vic: c. 70, s. 52.]

Inquisitions  
in lunacy.

English and Irish inquisitions in lunacy are treated by section 52 of the above Act in a similar manner.

## 16 &amp; 17 Vic: c. 70, s. 52.

s. 52.  
Inquisition  
and super-  
sedeas may  
be trans-  
mitted  
from and to  
Ireland and  
England,  
and acted  
on there  
respectively.

Where it is desired that an inquisition taken on a commission issued under, or a writ of supersedeas issued under, the great seal of the United Kingdom, or under the great seal of Ireland respectively, should be acted upon in Ireland or England respectively, the proper officer may, under order of the Lord Chancellor of Great Britain, or the Lord Chancellor of Ireland as the case may be, transmit a transcript of the record of the inquisition, or of the writ, to the Chancery of Ireland or of England, as the case may be, which transcript shall thereupon be entered and be of record there respectively, and shall, when so entered of record and if and so long only as the Lord Chancellor of Ireland intrusted as aforesaid, and the Lord Chancellor of Great Britain intrusted as aforesaid, as the case may be, shall see fit, be acted upon by them respectively, and be of the same validity and effect to all intent and purpose, as if the inquisition had been taken on a commission issued under, or the writ of supersedeas had been issued under, the great seal of Ireland or of the United Kingdom respectively.

Appeal to  
be made in  
country  
where  
inquisition  
held.

In *re Talbot*, a lady had been found lunatic in Ireland; she made an application for an enquiry before a jury in England, alleging a miscarriage of justice in Ireland. The Court of Appeal refused the application, holding that the record of the Irish proceedings, on being forwarded to this country, was to be entered of record without further enquiry just as if the proceedings had been originally taken here: and that, in accordance with the general theory of foreign judgments, if there had been any miscarriage of justice in Ireland, the application to set the proceedings aside should be made in Ireland.

*re Talbot*.  
W. N. 1882,  
p. 13.

For the effect of an Indian finding of lunacy in England, see page 300.

## V. PROBATE ACTS.

[20 &amp; 21 Vic: c. 79, ss: 94, 95.

21 &amp; 22 Vic: c. 56, ss: 12—14.]

English,  
Scotch or  
Irish  
probates.

The same principle has been applied to probates granted in any part of the United Kingdom: the statutes, 20 & 21 Vic: c. 79 for Ireland, and 21 & 22 Vic: c. 56 for Scotland (the Con-

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firmation and Probate Act), provide that a grant of probate or confirmation, or of letters of administration made in one part of the United Kingdom may, by being resealed, become effectual in any other part.

*20 & 21 Vic: c. 79, s. 94 (Ireland).*

From and after the 1st January, 1858, when any probate or letters of administration to be granted by the Court of Probate in England shall be produced to and a copy thereof deposited with the Registrar of the Court of Probate in Ireland, such probate or letters of administration shall be sealed with the seal of the said last-mentioned court, and being duly stamped, shall be of the like force and effect, and have the same operation in Ireland as if it had been originally granted by the Court of Probate in Ireland.

IRELAND.  
20 & 21 V.  
c. 79.  
s. 94.  
English  
grant sealed  
by Irish  
court has  
same  
operation as  
Irish grant.

*s. 95.*

From and after the 1st January, 1858, when any probate or letter of administration to be granted by the Court of Probate in Ireland shall be produced to and a copy thereof deposited with the Registrar of the Court of Probate in England, such probate or letters of administration shall be sealed with the seal of the said last-mentioned court, and being duly stamped, shall be of the like force and effect, and have the same operation in England as if it had been originally granted by the Court of Probate in England.

s. 95.  
Irish gran  
sealed by  
English  
court has  
same  
operation as  
English  
grant.

*Divenny v.  
Corcoran.*  
32 L. J: P  
& M. 26.

In *Divenny v. Corcoran*, the Irish court had granted administration of personalty in England no will having been found: a will was afterwards propounded in the English Court, but the Irish administrator obtained a verdict on the issues raised by him. The Irish grant was ordered to be delivered out of the registry to be resealed here under section 95.

*Mahon v.  
Hodges*  
Ir: Rep: 6  
Eq: 344.

In *Mahon v. Hodges*, English probate had been granted, limited to such property as the testatrix had power to dispose of. The Irish court held that as she had power to dispose of some property in Ireland, it would not decide what the particular sum was, but would reseat the probate, leaving that question to be determined by a court of construction. There is no doubt from the unqualified use of the word 'shall,' that under this act the court has a ministerial and not a judicial function to perform in resealing probates. (Sir C. Cresswell, in *the goods of Roche*.)

*goods of  
Roche.*  
7 Jur: 784.

*21 & 22 Vic: c. 56, s. 12 (Scotland).*

From and after the 12th November, 1858, when any confirmation of the executor of a person who shall in manner aforesaid be found to have died domiciled in Scotland, which includes, besides the personal estate situated in Scotland, also personal estate situate in England, shall be produced in the principal Court of Probate in England, and a copy thereof deposited with the Registrar, such confirmation shall be sealed with the seal of the said

SCOTLAND.  
21 & 22 V.  
c. 56,  
s. 12.  
Scotch con-  
firmation  
sealed in  
England has  
same effect  
as probate or  
administra-  
tion.

court, and returned to the person producing the same, and shall thereafter have the like force and effect in England as if a probate or letters of administration, as the case may be, had been granted by the said Court of Probate.

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s. 13.

s. 13.  
Scotch confirmation sealed in Ireland has same effect as probate or administration.

From and after the 12th November, 1858, when any confirmation of the executor of a person who shall so be found to have died domiciled in Scotland, which includes, besides the personal estate situated in Scotland, also personal estate situated in Ireland, shall be produced in the Court of Probate in Dublin, and a copy thereof deposited with the Registrar, such confirmation shall be sealed with the seal of the said court, and returned to the person producing the same, and shall thereafter have the like force and effect in Ireland as if a probate or letters of administration, as the case may be, had been granted by the said Court of Probate in Dublin.

s. 14.

s. 14.  
English or Irish probates or letters of administration certified in Scotch Commissary Court have same effect as Scotch confirmation.

From and after the 12th November, 1858, when any probate or letter of administration to be granted by the Court of Probate in England to the executor or administrator of a person who shall be therein or by any note or memorandum written thereon signed by the proper officer stated to have died domiciled in England, or by the Court of Probate in Ireland to the executor or administrator of a person who shall in like manner be stated to have died domiciled in Ireland, shall be produced in a Commissary Court of the County of Edinburgh, and a copy thereof deposited with the commissary clerk of the said court, the commissary clerk shall endorse or write on the back or face of such grant a certificate in the form as near as may be of the schedule (F) hereunto annexed [see p. 370]; and such probate or letter of administration, being duly stamped, shall be of the like force and effect and have the same operation in Scotland as if a confirmation had been granted by the said court.

For an example of re-sealing under this Act, see *Orr-Ewing v. Orr-Ewing*.

*Orr-Ewing v. Orr-Ewing*.  
9 App: ca: 34.

The memorandum of domicil mentioned in section 14 may be written after probate has issued (*in the goods of Allison*, overruling *in the goods of Muir*). The application was rendered necessary in consequence of a *bona fide* mistake with respect to certain shares which, after probate had been granted, turned out to be personalty in Scotland. The benefit of the statute would have been taken away if the court had not allowed a proper note to be made on the probate.

*goods of Allison*.  
34 L. J. P. & M. 20.  
*goods of Muir*.  
28 L. J. P. & M. 49.

When eik or additional confirmation will be sealed.

An eik or additional confirmation will not be sealed: if the original confirmation in Scotland is incomplete there must be a new confirmation including the whole of the personalty in England and Scotland, before the English court can affix its seal (*in the goods of Gordon*; *in the goods of Wingate*; *in the goods of Hutcheson*). In the first of these cases the original confirmation had been granted before the passing of the statute, and for this reason Lord

*goods of Gordon*.  
2 S. & T. 622.  
*goods of Wingate*.  
2 S. & T. 625.  
*goods of Hutcheson*.  
3 S. & T. 163.

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Penzance approved of the decision: he however doubted the wisdom of the principle as applied in the two other cases, and was glad to distinguish from them a case where the first confirmation had been sealed by the English court, but where fresh property in England had been discovered; he therefore ordered the additional confirmation to be sealed (*in the goods of Ryde*).

*goods of  
Ryde.*  
39 L. J. P.  
& M. 49.  
*goods of  
Webster.*  
29 L. J. P.  
& M. 66.

*In the goods of Webster*, the original Scotch confirmation having been sent to Victoria in duplicate, confirmation was obtained from the Commissary Court, and this was sealed in England under s. 12, complete faith being given to the Scotch Commissary's certificate.

Certified  
duplicate  
confirmation  
will be  
sealed.

*Rule 73 of Principal Registry (Non-C).*

The seal is not to be affixed to any probate or letters of administration granted in Ireland, so as to give operation thereto, as if the grant had been made by the Court of Probate in England unless it appears from a certificate of the Commissioners of Inland Revenue, or their proper officer, that such probate or letters of administration is duly stamped in respect of the personal estate and effects of which the deceased died possessed in England. In respect of letters of administration, the provisions of statute 21 & 22 Vic. c. 95, s. 29, must also be complied with.

*English  
practice.*

R. 73 (P.R.:  
Non-C.).  
Irish grants:  
certificate  
required.

*Rule 87 of District Registry.*

Grants of probate and administration made in Ireland and confirmations granted in Scotland must be taken to the principal Registry, and not to a District Registry, to be sealed with the seal of the Court of Probate, in order to the same having force and effect in England.

The fees payable on resealing an Irish or Scotch probate are the same as those payable in *Ireland* [see below].

R. 87 (D.R.)  
Irish and  
Scotch  
grants to be  
sealed in  
principal  
registry  
only.  
English fees.

*22 & 23 Vic: c. 31, s. 25.*

Letters of administration granted by the Court of Probate in England shall not be resealed, under 20 & 21 Vic: c. 79, s. 94, until a certificate has been filed, under the hand of a Registrar of the Court of Probate in England, that bond has been given to the judge of the Court of Probate in England in a sum sufficient in amount to cover the property in Ireland as well as England in respect of which such administration is required to be resealed.

*Irish  
practice.*

English  
grants:  
certificate  
required.

*goods of  
Potts.*  
2 S. & T. 5.

[*cf: in the goods of Potts*, and Miller's Irish Court of Probate Practice.]

The fees payable in Ireland are as follow:—

Irish fees.

For sealing Probate or Administration, with or without will annexed, or exemplifications of the same, under seal of the English Probate Court in order to its becoming in force for property in Ireland,—such fee as would be payable in respect of a grant originally made in Ireland for property



equal in amount to the property in Ireland which is to be affected by the Probate or other instrument to which the seal of the Court is to be affixed.

For the Registrar's fiat on an English grant	... ..	five shillings.
For sealing any confirmation of executor issued by authority of a Commissary Court in Scotland	... ..	one guinea.
For collating :—		
if 10 folios of 90 words each or under	... ..	half a-crown.
if above 10 folios of 90 words each, per folio	... ..	threepence.

*Scotch practice.**Act of Sederunt, 19 March 1859.*

[to regulate proceedings and fees under 21 & 22 Vic: c. 56.]

Certificate to be dated and subscribed by Commissary Clerk.

vii. That the certificate to be granted by the Commissary Clerk of the county of Edinburgh upon grants of Probate and Letters of Administration in terms of s. 14 and Schedule (F) of the Act, shall be dated as well as subscribed by him.

All persons to have access.

viii. That all copies of Probates or Administrations deposited with the Commissary Clerk of the county of Edinburgh under s. 14, shall be made patent to all persons desiring to see the same, on payment of the undermentioned fee; and when required the said Commissary Clerk shall furnish copies or excerpts of said documents, on payment of the undermentioned fee.

Scotch fees.

The fees payable in Scotland are as follow :—

To Commissary Clerk of Edinburgh.

- a. For collation of English and Irish Probates or Letters of Administration, per sheet of 250 words ... .. twopence.
- b. For entering abstracts of such Probates or Letters of Administration in the Commissary Books, and granting certificate in the form of Schedule (F) ... .. half-a-guinea.

For searcher.

For giving inspection of any of the records of the Court, and in Edinburgh of any copy Probate lodged with the Clerk, each case, when not, exceeding 5 years back ... .. one shilling.  
if beyond 5 years ... .. half-a-crown.

*Schedule (F) of 21 & 22 Vic: c. 56.*

Certificate of commissary clerk.

I, *A.B.*, Commissary Clerk [*or* Commissary Clerk Depute] of the County of Edinburgh, hereby certify that this grant of Probate has [*or* these Letters of Administration have] been produced in the Commissary Court of the said County, and that a copy thereof has been deposited with me.

The Australasian Probate Acts.

The Australasian Colonies have recently adopted a series of Inter-Colonial Probate Acts.

The first was passed in Tasmania in 1879. South Australia, Western Australia and New Zealand having now followed the lead.

Chapter  
XI.

The provisions resemble those of the Australasian Creditors Acts which have already been noticed [p. 361, *cf.* p. 396]: the probate granted in one colony by being resealed in another, becomes effectual there.

In the Act of South Australia this provision has been extended to probates of the United Kingdom; in the Act of Western Australia to probates of all the British Dominions.

In some of the Colonies probates of wills under seal of a Colonial Probate Court in any of Her Majesty's dominions are taken as *prima-facie* evidence of the will for the purpose of passing property in those Colonies on being recorded there in the Registry Office. [*cf.* chapter xii.—Antigua, Grenada, Jamaica, Nevis, Nova Scotia, Prince Edward Island, St. Vincent.]

## VI. THE BANKRUPTCY ACT, 1883.

[46 & 47 Vic: c. 52, ss: 14. 27. 117—119.]

A similar provision has been adopted in Bankruptcy. The courts of the three parts of the United Kingdom are made auxiliary to each other, for the mutual enforcement of orders.

46 & 47 Vic: c. 52. s. 14.

If in any case where a receiving order has been made on a bankruptcy 46 & 47 V. petition it shall appear to the court by which such order was made, upon an application by the official receiver, or any creditor or other persons interested, that a majority of creditors in number and value are resident in Scotland or in Ireland, and that from the situation of the property of the debtor, or other causes, his estate and effects ought to be distributed among the creditors under the Bankrupt or Insolvent Laws of Scotland or Ireland, the said court, after such inquiry as to it shall seem fit, may rescind the receiving order and stay all proceedings on, or dismiss the petition upon such terms, if any, as the court may think fit.

## s. 27.

(6) The court may if it think fit, order that any person who if in England would be liable to be brought before it under this section (for discovery of the debtor's property) shall be examined in Scotland or Ireland, or in any other place out of England.

## s. 117.

Any order made by a court having jurisdiction in bankruptcy in England under this Act shall be enforced in Scotland and Ireland in the courts having

Colonial  
Probate  
Acts.

46 & 47 V.  
c. 52. s. 14.  
Power to  
annul  
court to  
receiving  
order; when  
property,  
etc., in  
Scotland or  
Ireland.

s. 27.  
Power to  
order exami-  
nation out  
of England.

s. 117.  
Enforcement  
of orders in

the United Kingdom.

jurisdiction in bankruptcy in those parts of the United Kingdom respectively, in the same manner in all respects as if the order had been made by the court hereby required to enforce it ; and in like manner any order made by a court having jurisdiction in bankruptcy in Scotland shall be enforced in England and Ireland, and any order made by a court having jurisdiction in bankruptcy in Ireland shall be enforced in England and Scotland by the courts respectively having jurisdiction in bankruptcy in the part of the United Kingdom where the orders may require to be enforced, and in the same manner in all respects as if the order had been made by the court required to enforce it in a case of bankruptcy within its own jurisdiction.

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XI.

### s. 118.

s. 118.  
British  
Courts to  
be auxiliary  
to one  
another.

The High Court, the County Courts, the courts having jurisdiction in bankruptcy in Scotland and Ireland, and every British court elsewhere having jurisdiction in bankruptcy or insolvency, and the officers of those courts respectively, shall severally act in aid of and be auxiliary to each other in all matters of bankruptcy, and an order of the court seeking aid, with a request to another of the said courts, shall be deemed sufficient to enable the latter court to exercise in regard to the matters directed by the order such jurisdiction as either the court which made the request, or the court to which the request is made, could exercise in regard to similar matters within their respective jurisdiction.

The effect of this section [section 74 of the Act of 1869] was considered by Mellish, L.J., in *re O'Reardon*: the case however was not decided upon it. *re O'Reardon.*  
L. R. 9  
Cl: 74.

It will be noticed that the section is not limited to courts of the United Kingdom, but extends to 'every British court.'

### s. 119.

s. 119.  
English  
warrants  
enforceable  
in all parts  
of Her  
Majesty's  
dominions.

(1) Any warrant of a court having jurisdiction in bankruptcy in England may be enforced in Scotland, Ireland, the Isle of Man, the Channel Islands, and elsewhere in Her Majesty's dominions, in the same manner and subject to the same privileges in and subject to which a warrant issued by any justice of the peace against a person for an indictable offence against the laws of England may be executed in those parts of Her Majesty's dominions respectively in pursuance of the Acts of Parliament in that behalf.

(2) A search warrant issued by a court having jurisdiction in bankruptcy for the discovery of any property of a debtor may be executed in manner prescribed or in the same manner and subject to the same privileges in and subject to which a search warrant for property supposed to be stolen may be executed according to law.

Scottish  
practice.

Section 117 is the same, with slight verbal alterations, as s. 73 of the Bankruptcy Act of 1869. The Act of Sederunt of 21 June, 1883, given on page 365, though passed to regulate procedure under the Act of 1869, will clearly still operate in Scotland with regard to orders under the new Act of 1883.

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XI.**

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The question of orders of the United Kingdom in matters of guardianship has not been dealt with by statute.

With regard to Divorce, the validity of a Scotch decree has again been argued and pronounced upon. We have already considered the question in the chapter dealing generally with Divorce. It has been stated that an Imperial Statute may soon decide finally upon the vexed question. With the debates on the passage of such an Act through the Houses of Parliament it may be hoped that the shade of Lolley and the discussions upon his famous case will at last be laid to rest.

## CHAPTER XII.

## Chapter XII.

## THE LAWS OF THE BRITISH COLONIES.

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*The classification adopted is based upon that in use at the Colonial Office.*

*The author gratefully acknowledges much valuable assistance received from Mr Russell and Mr Atchley of the Colonial Office Library, in the compilation of this Chapter.*



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We propose now to consider the laws of the different colonies of Great Britain as they are applicable to the different subjects which have been discussed in the foregoing chapters.

General principles of Colonial Law.

The law prevailing in any colony depends upon the charter granted to it at the time of its passing under the control of the mother country. This charter usually provides for one of two things: Either the law of England at the date of the charter is made bodily the law of the new colony; or the foreign law already in force there at that date are continued.

Thus where a territory becomes English by occupation, as the Falkland Islands, the English Common Law is made the law of the colony: but where a territory is ceded to England, the foreign law then in force is continued. French, Roman-Dutch and Spanish laws prevail in different parts of Her Majesty's dominions, and the courts of these colonies being within the appellate jurisdiction of the Privy Council, that tribunal is frequently called upon to decide questions of foreign law. The principles which guide it in determining such questions will be found under the colonies Quebec and British Guiana [pp: 385]. It rests with the party relying on the foreign law to prove it to the court: unless this is done, although a different system of jurisprudence prevails in the colony the general law of this country will be applied; as for example, to questions relating to lands in a colony. (*Bentinck v. Willink*. 2 Hare 1.)

Foreign law continued in ceded colony.

Foreign law to be proved to the court.

The appointment of a Colonial Legislature provides for the passing in due course of statutes according to the wants of the colonists, which are subject to the approval of the Sovereign in Council. On important subjects some few Imperial Statutes are passed, or Orders in Council issued, extending to the colonies, but full power is vested in the Colonial Legislature to pass such acts as it thinks fit.

With regard to colonial laws void for repugnancy or inconsistency, see the statute 28 & 29 Vic: c. 63 [U.K.], 'an Act to remove doubts as to the validity of colonial laws.'

## Chapter XII.

English Common Law  
taken to a settled colony.

To a settled country the settlers are presumed to carry with them from the mother country such portion of its Common and Statute Law as is applicable to their new situation, and also the rights and immunities of British subjects (*Kielly v. Carson*. 4 Mo: P. C. C. at p. 84): but as Lord Cranworth pointed out in *Whicker v. Hume* (7 H. L. Ca: at p. 161), the difficulty of determining what laws are adapted to the situation of the colony is of necessity very great.

Adoption of Imperial  
Statutes.

Many of the smaller colonies adopt English statutes without alteration. Sometimes an act is passed introducing several at the same time, as in the case of 'The English Acts Act, 1854' of New Zealand; and the Law No: 12 of 1855 of Trinidad, which introduced all the then recent amendments in the English law of evidence. Where this has been done, and the English statute has been authoritatively construed by the Court of Appeal in England, such construction should be adopted by the courts of the colony. (*Trimble v. Hill*. 5 App: Ca: 342.) The same principle applies to the construction of Imperial Statutes extended in their application to any or all of the colonies.

Construction of Imperial  
Statutes.

It will be seen that many of the colonies have adopted either entirely or in part the English Judicature Acts; sections 24 and 25 of the Act of 1873 having been in nearly all cases preserved intact. With certain modifications the rules and orders of 1875 have also been adopted either in the English form or in the form of a Code of Civil Procedure. In some however a statute modelled on the English Common Law Procedure Act 1852, is still in force: in some of the more active colonies the rules of 1883 may possibly be adopted in a short time: the author has endeavoured to obtain the latest available information before going to press.

With the exception of the Indian Code of Civil Procedure, the Acts of New Brunswick and Nova Scotia, and an old statute of the Isle of Man, the subject of foreign judgments has not been specially dealt with by the Colonial Legislatures, the decisions of the courts agreeing in the main with those of English courts; the cases in which some principle which has not been dealt with in this country is involved have been introduced in the main body of the work.

The statutes referred to deal chiefly with the question of service on absent defendants. With reference to this question it will be noticed that the service of notice in lieu of writ on absent foreigners has in nearly all cases been omitted although the procedure has been framed on the English rules of court. A serious question for

the decision of the Privy Council may possibly arise in consequence of this omission.

**Chapter XII.**

The Imperial Statute, 6 & 7 Vic: c. 22, confirmed certain colonial laws which provided for the admission of evidence of barbarous and uncivilised people who, being destitute of the knowledge of God and of any religious belief, would otherwise be incapable of giving evidence on oath in the courts of the colonies.

Evidence of uncivilised people to be received in certain colonies.

The following is a list of the colonies in which foreign law prevails.

*French.*

Quebec (Lower Canada).  
Saint Lucia.  
Mauritius.  
Channel Islands. [*Old Norman.*]

*French and Italian.*

Malta.

*German.*

Heligoland.

*Spanish.*

Trinidad.

*Roman-Dutch.*

British Guiana.  
Cape of Good Hope.  
Griqua Land West.  
Ceylon.

## I. THE INDIAN EMPIRE.

[including **MYSORE** and **BERAR**; the **NATIVE STATES**; **ADEN**, and the Islands of **PERIM** and **SOCOTRA**.]

The 'Supreme Court of Judicature at Fort William' established by charter under the provisions of 13 George III. c. 63. s. 13 was abolished by 24 & 25 Vic: c. 104, which statute enabled Her Majesty to establish by letters patent a 'High Court of Judicature at Fort William' in Bengal for the Bengal Division of the Presidency of Fort William; and also High Courts at Madras and Bombay for those Presidencies respectively. By section 11,

Constitution of the Indian courts.



## Chapter XII.

existing provisions applicable to the old Supreme Courts are to apply to the new High Courts.

Presumably therefore the 13th clause of the Charter of 1774 (14 G. III.) relating to the Supreme Court at Fort William, and the corresponding clauses of the charters relating to Madras and Bombay are still in force.

The general effect of those clauses is as follows :—

The court has jurisdiction in all actions arising in the Presidency against any subject residing within the Presidency, upon any contract in writing with a British subject, when the cause of action exceeds 500 rupees, and it shall have been agreed that the matter may be determined by the court ; but not against persons never resident there, or then resident in Great Britain or Ireland, unless the action be commenced within two years after the cause of action arose, and the sum to be recovered be not of greater value than 30,000 rupees.

*Code of Civil Procedure. [No: 10 of 1877.]*

Definitions.

s. 2. A 'foreign court' means a court situate beyond the limits of British India, and not having authority in British India, nor established by the Governor General in Council.

A 'foreign judgment' means the judgment of a foreign court.

*lis alibi pendens* no bar to action.

s. 12. (*Explanation*). The pendency of a suit in a foreign court does not preclude the courts in British India from trying a suit founded on the same cause of action : unless, (according to the section) the suit is pending before Her Majesty in Council.

s. 13. *Res Judicata*. No court shall try any suit or issue in which the matter directly and substantially in issue has been heard and finally decided by a court of competent jurisdiction, in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title.

Court's jurisdiction to be presumed, except in case of apparent error.

(*Explanation* 6). Where a foreign judgment is relied on, the production of the judgment duly authenticated is presumptive evidence that the court which made it had competent jurisdiction, unless the contrary appear on the record ; but such presumption may be removed by proving the want of jurisdiction.

EFFECT OF FOREIGN JUDGMENTS.  
—  
defences allowed.

s. 14. No foreign judgment shall operate as a bar to a suit in British India,

## Chapter XII.

- (a). if it has not been given on the merits of the case.
- (b). if it appears on the face of the proceeding to be founded on an incorrect view of International Law, or of any law in force in British India.
- (c). if it is in the opinion of the court before which it is produced contrary to natural justice.
- (d). if it has been obtained by fraud.
- (e). if it sustains a claim founded on a breach of any law in force in British India.
- ss: 36. 37 (a), (c). 38. A recognised agent may be served with process and may enter an appearance and make applications:—
- such agents are, persons holding general powers of attorney from parties non-resident authorising such acts, and persons carrying on business for and in the names of parties non-resident, in matters connected with such business, when no other agent is so authorised.
- s. 41. Any one in the jurisdiction may be appointed agent. The appointment may be special or general, and shall be made by an instrument in writing signed by the principal; and such instrument, or if the appointment be general, a duly attested copy thereof, shall be filed in court.
- s. 89. If the defendant is non-resident and has no agent empowered to accept service, the summons is to be addressed to the defendant at the place where he is residing, and forwarded to him by post if there be postal communication between such place and the place where the court is situate.
- s. 90. If there is a British Resident or Agent of the Government in or for the territory in which the defendant resides, the summons may be sent to such Resident or Agent by post or otherwise for the purpose of being served upon the defendant; and if the Resident or Agent return the summons with an endorsement under his hand that the summons has been served on the defendant in the manner hereinbefore directed, such endorsement shall be conclusive evidence of the service.

The general form of service on absent defendants is shortly as follows:—A copy of the writ, together with the plaint signed by

service on recognised agent of non-resident.

definition of recognised agent.

Appointment of agent.

Special or general,

to be filed.

Service on non-resident with no agent.

Service through British Resident.

Endorsement of Resident,

Form of service on absent defendants with no agent.

**Chapter XII.**

affidavit of agent.

counsel or attorney (s. 51) and concise statements (s. 58), is sent to an agent in the foreign country for service on the defendant. After service, the agent returns an affidavit that he has served the copy of the writ as required, and that the defendant in his presence signed his name at the back signifying his acceptance of the service, or that the defendant refused to sign, as the case may be.

**PROOF OF FOREIGN JUDGMENTS.**

Sealed copy of the judgment to be received. Documents admissible in the same degree as in United Kingdom.

*Evidence Act. [No: 1 of 1872.]*

s. 77 (b). in effect the same as 14 & 15 Vic: c. 99, [U.K.] s. 7.

s. 82. *id:* s. 11, as to documents admissible in England, Scotland and Ireland.

*Code of Civil Procedure.*

As to foreign judgments.

s. 86. The court may presume that any document purporting to be a certified copy of any judicial record of any country not forming part of Her Majesty's dominions is genuine and accurate, if the document purports to be certified in any manner which is certified by any representative of Her Majesty or of the Government of India resident in such country to be the manner commonly in use in that country for the certification of copies of judicial records.

Certificate of H. M.'s representative.

**STATUTES OF LIMITATION.**

Suits on foreign contracts.

*Limitation Act. [No: 15 of 1877.]*

s. 11. Suits instituted in British India on contracts entered into in a foreign country are subject to the rules prescribed in this Act.

When foreign statute a good defence.

No foreign rule of limitation shall be a defence to a suit instituted in British India on a contract entered into in a foreign country, unless the rule has extinguished the contract, and the parties were domiciled in such country during the period prescribed by such rule.

*[Schedule.]*

Period of limitation.

Actions on judgments of British India are limited to 12 years : on foreign judgments to 6 years.

With regard to the removal from India of lunatics so found by inquisition, and the effect of the inquisition in England, see page 300.

## II. NORTH AMERICAN.

### CANADIAN PROVINCES.

[ONTARIO to PRINCE EDWARD ISLAND, inclusive.]

#### ONTARIO [*Upper Canada*].

##### 44 *Vic: c. 5. [Judicature Act]*

introduced the principles of the English Judicature Act.

Order II, rule 4. Where there is jurisdiction in any of the Superior Courts to proceed with a suit on a service out of Ontario, the writ of summons to be so served shall be in Form No: 2, in appendix (A) hereto, with such variations as circumstances may require. Where a defendant is not a British subject, and is not in British dominions, notice of the writ of summons is to be served in lieu of service of the writ, and such notice shall be in Form No: 3 in the same Part, with such variations as circumstances may require.

SERVICE OUT OF THE  
JURISDICTION.  
s. 8.  
Writ and notice for  
service out of jurisdiction.

Order VII, rule 1. The same as English Order XI, rule 1 [1875], arranged (a) (b) (c) (d), to which is added,

s. 45.  
in what cases allowed.

(e). Where the action is upon a contract or judgment though the same be not within any of the four classes already enumerated, but it appears to the satisfaction of the court or a judge that the defendant has assets in Ontario of the value of \$200 at least, which may be rendered liable to the judgment in case the plaintiff should recover judgment in the action; and if the defendant does not appear, the court or a judge is to give any directions which the court or judge from time to time sees fit as to the manner of proceeding in the action, and the conditions on which the same may be proceeded with; and shall require the plaintiff, before obtaining judgment, to prove his claim and the amount of debt or damages (if any) to the satisfaction of the court or judge, and in such mode as the court or judge, having reference to the nature of the case, may direct.

rule 2. Where a defendant is served out of Ontario, he shall have the time following for entering his appearance and delivering his defence, and both proceedings shall be taken within the time named:—

s. 46.  
Times for appearing and  
delivering defence.

**Chapter XII.**

Dominion of Canada (other than Ontario, Manitoba, Kenvatin or the North-west Territories, or British Columbia)	6 weeks
Manitoba, Kenvatin or the North-west Territories, British Columbia, Newfoundland	8 „
United States	6 „
United Kingdom (including Isle of Man, and the Channel Islands)	8 „
Elsewhere	12 „

Claim to be served with the writ.

(d) The writ of summons in such case may be in the form set forth in Appendix (A), and the statement of claim is to be served therewith.

s. 47.  
Saving of jurisdiction to vary times, etc:

Order VII, rule 3. The preceding rules of this order are not intended to interfere with or affect the powers of the High Court, or a Judge thereof in the exercise of the jurisdiction heretofore possessed by either or any of the courts hereby consolidated, to direct on application in that behalf, that service in any other manner may be good service, or that the time for defending shall be other than the time above named, or to give any special or other directions as respects proceeding against a defendant out of Ontario.

s. 48.  
Leave to serve not required.

rule 4. It shall not be necessary before serving the writ, or notice of the writ, to apply to the court or judge to allow the service; but in case proof is given to the satisfaction of the court or judge that the service was duly made, and that the case was a proper one for service out of the Province under the preceding rules, the service shall be allowed.

s. 49.  
Service of notice in lieu of writ.

rule 5. Notice in lieu of service shall be given in the manner in which writs of summonses are served.

PROOF OF FOREIGN  
JUDGMENTS

*13 & 14 Vic: c. 19.*

s. 1. the same as English Act 14 and 15 Vic: c. 99, s. 7, but much curtailed, and restricted to judgments of England, Scotland, Ireland, Lower Canada and the United States.

*43 Vic: c. 7*

adopts the same principle with regard to judgments of any of the Canadian Provinces, or of any British colony or possession.

*23 Vic: c. 24*

relates to the mutual enforcement of the judgments of Ontario and Quebec. [The first section of this Act, which was repealed



by 39 Vic: c. 7, Schedule A (13), allowed original defences to be raised in actions on foreign judgments.]

Chapter XII.

43 Vic: c. 12

passed to improve the administration of Justice in the Districts of Algoma, Thunder Bay and Nipissing.

Districts of Algoma, Thunder Bay, and Nipissing.

s. 5. Jurisdiction of the Court of Algoma :—provided always as to the additional jurisdiction so hereby conferred that the contract was made within Algoma, or the cause of action arose therein, or the defendant resides therein.

QUEBEC [*Lower Canada.*]

[including the Isle of ANTICOSTI and the MAGDALEN Isles.]

[The sections of the Civil Code of Saint Lucia have been printed, where they correspond with the Civil Code of Quebec, that being the more recently published.]

*Civil Code.*

s. 18.	The same as Civil Code of St Lucia, s. 14. [p. 409]	Rights of British subjects.
s. 27.	<i>id:</i>	s. 20. „ Actions against non-resident aliens : in what cases.
s. 28.	<i>id:</i>	s. 21. „ Actions against inhabitants : in what cases.
s. 29.	<i>id:</i>	s. 22. [p. 410] Security for costs.
s. 1220	<i>id:</i>	s. 1152, „ PROOF OF FOREIGN JUDGMENTS.
	[as to security for costs when the judgment is denied see s. 145, Code Civ: Proc: p. 386].	
s. 2034	<i>id:</i>	s. 1903. „ Judicial hypothec.

*Code of Civil Procedure.*

s. 14. All foreign corporations or persons, duly authorised under any foreign law to appear in judicial proceedings, may do so before any court in Lower Canada.

Foreign companies may sue.

Any person who, according to the laws of a foreign country, is authorised to represent a person who has died or made his will therein, leaving property in Lower Canada, may also appear as such in judicial proceedings before any court in Lower Canada.

Foreign executor or administrator may sue.

ss. 61. 62. 64. Foreign companies or corporations, and all executors of wills, administrators, or representatives of the succession of persons having had property in Lower Canada, may if they have an office or an agent in Lower Canada, or carry on business therein, be summoned there ; and service may be made at the

Service on foreign companies with office in L. C.

## Chapter XII.

With no office.

office, speaking to a person employed in such office, or elsewhere upon the president, secretary or agent : And if they have no such office, nor any known president or secretary or agent, upon a return to that effect, the court or judge may order the service to be by a notice to be inserted during one month in at least one newspaper ; and such notice is held to be a sufficient service. If the agent is one for specific purposes only, and not having the charge of the company's business without limitation he cannot be served for the defendant company. (*Macpherson v. St. Lawrence Insurance Co*: 5 L. C. Rep: 403.)

Service on absent defendant with property in L. C.

s. 68. If the defendant has left or has never had his domicile in Lower Canada and has property therein, the court or judge or prothonotary, upon a return stating that he cannot be found in the district, may order him to appear within two months of the last publication of such order.

Publication of the order.

The order must be published in French and English, and be twice inserted in a newspaper published in each language respectively in the district where the court is held ; in default of either of such newspapers in such district, then it is to be inserted in a similar newspaper of the nearest locality : The newspapers are to be indicated in the order.

In this case execution can only issue after one year unless security be given for repayment of the money in the event of the judgment being reversed upon revision. [s. 552.]

No judgment by default against absent defendant.

s. 92. No judgment by default for non-appearance can be rendered or recorded against any absentee defendant, who has been summoned as such.

The court itself is to determine as to its jurisdiction at once.

ss: 113. 115. The court, whether a declinatory exception is pleaded or not, is to determine whether the action is within its jurisdiction ; in declaring itself incompetent it may award costs according to circumstances.

Denial of foreign judgment proved under Civil Code, s. 1220.

s. 145. The denial of any document specified in s. 1220 of the Civil Code (i.e. records of foreign judgments) must be accompanied by the giving of security for the costs of the commission required to obtain the proof of such document.

French law in Lower Canada.

The province of Quebec, or Lower Canada, formerly in possession of the French, was ceded to the English in 1763 : the French codes then in force there remained law in the province by virtue of the Quebec Act.

In those colonies where foreign laws still prevail, proof should be given in some form that the ordinance in question was

transmitted to the colony in order to make it part of the law of the colony: Ordinances do not take effect in colonies *proprio rigore*, to do so they must be registered there (*Du Boulay v. Du Boulay*, L. R. 2 P. C. 430; *Hutchinson v. Gillespie*, 4 Mo: P. C. C. 378).

Thus the French laws of feudal tenures having been introduced and registered in French Canada still continue in force. (*Sœurs de St. Joseph v. Middlemiss*, L. R. 3 App: Ca: 1102.)

The edict of Louis XIV. (1663) which created the Conseil Supérieur and established Courts of Justice for Lower Canada, directed that the Coutumes de Paris should be the general law of the province. The Roman Law, though held to govern as *loi écrite* in some parts of the South of France, was in other parts of the kingdom only borrowed and modified by 'Les Coutumes' as expounded by the jurisprudence of the Parliament of Paris. (*Symes v. Cuvillier*, L. R. 5 App: Ca: 138.) With regard to the Roman Law in force, the Theodosian Code and therefore the law of the Antonines ought to prevail over that of Justinian in countries governed by the Code of Paris. (*Evanturel v. Evanturel*, L. R. 6 P. C. 1.)

'Coutumes de Paris' and Roman Law.

Roman Codes in force.

The Privy Council is necessarily called upon very frequently to expound foreign law: The principles upon which the English court should act in such cases are laid down in the judgment of the Privy Council delivered by Turner, L.J., in the case of *Her Majesty's Procureur and Advocate General v. Bruneau* (L. R. 1 P. C. 169). They are a condensation of the principles collected in the 3rd section of Sirey's note upon Article 1 of the Code Napoléon:—

'We are to be guided by the plain sense of the law which applies to the question: we are to make no distinction which can alter that sense: assuming the sense of the law to be positive, we are not to modify or restrict the law upon any consideration, however powerful: the law is to be applied as it stands, any accidental errors notwithstanding: we are not to weigh the reasons of the law against the words of it: if the law applicable to the case be special, we are to understand it according to its particular scheme (*propre système*) without adding to it what is called the Common Law.'

As to the interpretation of the French law by Canadian courts and by the Privy Council on appeal, the modern French authorities consisting of commentators on the Code Napoléon and the decisions of the French courts since the promulgation of that Code

Interpretation of French law.

**Chapter XII.**

English Criminal Law in force.

are not binding, though they are extremely valuable aids towards the right determination of any question. (*id.*)

With the cession however English Criminal Law came into force in the province, and still continues in force except so far as it has been altered by Canadian or Imperial Statutes applicable to Canada. (*R. v. Coote*, L. R. 4 P. C. 599.)

**NOVA SCOTIA.**

[including CAPE BRETON ISLAND.]

EFFECT OF FOREIGN  
JUDGMENTS.

*43 Vic: c. 13,*

s. 27, reproduces the old Act, 24 Vic: c. 6, which allowed original defences to be raised in an action on a foreign judgment:—

Original defences may be raised.

In any action heretofore or hereafter to be brought in any court of this province against any person domiciled in this province upon a judgment recovered against such person in any court in any other province or country, the record or other evidence of such judgment shall not be conclusive evidence in any such action on such judgment in this province of the correctness of such judgment; but the defendant in any such action on such judgment may enquire into contest and dispute all or any of the facts upon which such judgment is founded, or the cause in the suit in which such judgment was given, and may raise the same defence in such suit upon such judgment as he could have done if such suit had been brought for the original cause of action, as fully as if such judgment in such other province or country had never been given or entered up.

SERVICE OUT OF THE  
JURISDICTION.

Concurrent writs.  
As to actions against  
British subjects.

*Revised Statutes, c. 94.*

s. 38. the same as English C. L. P. Act, 1852, s. 22.

s. 43. *id.* s. 18,

except as to the cause of action in respect of which service is allowed, as to which the section runs as follows:—

It shall be lawful for the court or judge,—upon being satisfied by affidavit that there is cause of action which arose within this province, or in respect of a breach of a contract made within the province, in whole or in part, or intended to be executed in whole or in part within this province, or, in respect of a contract made and entered into between parties, one of whom, at the time of making such contract, shall reside within this province, and that the writ, etc:

s. 44. In all cases when it shall be made to appear by affidavit, to the satisfaction of the court or judge, that a defendant is absent from the province, so that personal service of process cannot be effected on him, or that he is remaining abroad so as to evade service, and that he has an agent within the province and also that the plaintiff has a good and available cause of action against the defendant, the court or a judge may make an order for the service of process on the agent, which service shall be deemed good and sufficient service on the defendant; and the plaintiff may therefore proceed in the action to judgment and execution, as if such defendant had been personally served.

s. 45. The court or a judge may on sufficient cause shown by the agent allow a reasonable time for such agent to communicate such writ to the defendant.

s. 46. If after due diligence no agent can be found, the Court or Judge may make an order for the defendant to appear and plead on the day named, which order is published in the *Royal Gazette* newspaper, or in such other way as may be directed: The publication of such order shall be deemed good service on the defendant, and the plaintiff may proceed with the action.

s. 47. The defendant shall be at liberty to appear and plead to such action at any time previous to judgment signed.

s. 48. The defendant at any time within three years after judgment signed, may on application to the court or a judge, on affidavit accounting for his non-appearance, and disclosing a defence on the merits, obtain an order to appear and plead, and for re-hearing of the cause, which order shall operate as a stay of any execution issued on such judgment, but the judgment obtained, shall until removed, stand as security to the plaintiff for the amount thereof.

s. 49. Execution is not to issue upon the judgment until the plaintiff gives security for repayment of all moneys levied thereunder in case the judgment should be reversed.

s. 50. The same as the English C. L. P. Act, s. 19.

The cases in which the writ may issue are the same as those mentioned in s. 43, the form of the writ only being altered.

s. 185. Where a party who has brought an action or been served with process within the jurisdiction resides out of the province, notice of trial shall be served at least twenty days before the first day of the Term or the Sittings thereafter.

Service on agent in absence of defendant.

Time granted to agent.

Publication of order in *Gazette* good notice to defendant.

Appearance good if before judgment signed.

Rehearing during three years.

Plaintiff to give security.

As to actions against foreigners.

Notice of trial to non-residents.



## Chapter XII.

PROOF OF FOREIGN  
JUDGMENTS.

Foreign probates.

*Revised Statutes, c. 96.*

s. 27. The same as English Act 14 &amp; 15 Vic: c. 99. s. 7.

s. 28. *id:* s. 11.

s. 34. The probate or copy of a will under the hand of the Judge or Registrar shall be received as evidence of the original will in all causes, unless upon cause shown on affidavit. The court may require other proof.

This section applies to wills regularly proved abroad.

*44 Vic: c. 10.*Service by publication in  
probate suits.

s. 2. Where personal service cannot be made on an executor, administrator, or other party interested in an estate of any citation order or other paper owing to absence from the province the Judge may order publication of such paper, and the publication is to be sufficient service.

## NEW BRUNSWICK.

EFFECT OF FOREIGN  
JUDGMENTS.When defendant not  
personally served,  
original defences may be  
raised.*27 Vic: c. 41.*

In any action on a foreign judgment where the defendant was not personally served with the original process or first proceeding in the suit within the jurisdiction of the court where the judgment was obtained, the defendant may go into the merits of the case, and may avail himself of any matter of law or fact which would have been available had the original action been tried in the province; provided always, that notice of such defence shall be given in like manner as is required by the course and practice of the courts of the province, any law, usage or custom to the contrary notwithstanding.

SERVICE OUT OF THE  
JURISDICTION.Actions against British  
subjects.*18 Vic: c. 25.*

s. 1. The same as English C. L. P. Act 1852. s. 18, except as to the cause of action in respect of which service is allowed, as to which the section runs as follows:—

It shall be lawful for the court or a judge upon being satisfied by affidavit that there is a cause of action which arose within the jurisdiction, or in respect of the breach of a contract made wholly or in part within the jurisdiction, or in respect of any contract executed or to be executed in whole or in part within the jurisdiction, and that the writ, etc:—

s. 2 the same as English C. L. P. Act 1852. s. 19.

s. 3 *id:* s. 22.Against foreigners  
concurrent writs.

## Chapter XII.

## 14 Vic: c. 2.

s. 1. Service on non-resident persons carrying on business in the province who may have a place of business, but no place of residence therein may be effected by leaving a copy of process, with the ordinary English notice thereunder written of the purport and effect of such notice, at the place of business with some agent, clerk, or adult person in the employment of the defendant in such business, and known to the person serving the writ to be such.

As to actions against non-residents carrying on business in the Colony.

s. 2. The same course may be adopted in case of temporary absence, or absence for the purpose of avoiding service.

Temporary or intentional absence.

The nature and place of the business carried on by the defendant in the province, and the particular nature of the agency or employment of the person with whom the copy of the process may have been left for the defendant must be stated in the affidavit of the Sheriff or Deputy Sheriff making such service, or otherwise proved to the satisfaction of the Judge before any order is made for perfecting such service. [Rules of the Supreme Court, T. T. 1857.]

Affidavit.

## 17 Vic: c. 18.

ss: 40-44 relate to enforcing decrees against persons out of the limits of the province: the general effect of them is the same as ss: 53-58 of the New Zealand Code of Civil Procedure [cf: pp: 401, 402], except that the time allowed for the defendant to petition against the decree is two instead of three years.

Decrees against absent persons.

## 12 Vic: c. 39.

ss: 16. 17. The same as the Prince Edward Island Statute, 28 Vic: c. 6. ss: 1. 2 [cf: p. 394].

Service on foreign and domestic companies.

## 13 Vic: c. 37.

Upon any trial of any cause wherein it shall be necessary to prove any contract or engagement entered into by any foreign corporation doing business in the province it shall only be necessary for the party seeking to prove such contract or engagement, to prove that it was duly signed or issued by the accredited agent or officer of such corporation in the province: and it shall then be considered duly proved without further evidence of its execution, any law, usage or custom to the contrary notwithstanding.

Proof of documents in actions against foreign companies.

## Chapter XII.

PROOF OF FOREIGN  
JUDGMENTS.*19 Vic: c. 41.*

ss: 5. 6. The same as English Act 14 & 15 Vic:  
c. 99, ss: 7. 11.

## MANITOBA.

*38 Vic: c. 5*

Court act.

provides for the administration of justice in the province; but  
there is no special reference to service out of the jurisdiction.

## NORTH WEST TERRITORIES.

[including KENYATIN District.]

*No: 4 of 1878.*

Service on agent carrying s. xii. (2). In case any defendant is resident out of the North  
on business for absent  
defendant.

West Territories but has an agent, managing clerk or other  
representative resident carrying on his business within the  
same, service of the summons to appear may be made on such  
agent, managing clerk or other representative, who for the  
purpose of being served with the summons or any other pro-  
ceedings in the action requiring service on a defendant, shall  
be deemed the agent of such defendant.

SERVICE OUT OF THE  
JURISDICTION.

As to action against  
British subjects.

(3). The same as English C. L. P. Act 1852, s. 18, but is  
not limited to actions against British subjects. When the  
stipendiary magistrate is satisfied that the provisions of the  
section have been complied with he may order the plaintiff to  
proceed subject to such conditions as he thinks fit to impose:  
But in every such action the plaintiff before obtaining judg-  
ment, shall prove his claim as if the same were contested.

Service on corporations.

(4). In actions against corporations, the service may be  
upon the president, head officer, cashier or clerk.

## BRITISH COLUMBIA.

[including VANCOUVER ISLAND and QUEEN CHARLOTTE ISLAND, united  
by the British Columbia Act, 1866, 29 & 30 Vic: c. 67 (U. K.).]

*42 Vic: c. 12*

introduced in substance into the province the English Judicature  
Act.

The orders and rules have not as yet been received at the  
Colonial Office, but it is presumed that they will resemble the  
English orders.

*39 Vic: c. 40,***Chapter XII.**

s. 2, provides a form of service of legal process on foreign companies carrying on business in the province, there being no office or head officer.

Service on foreign companies.

The writ of summons is to be delivered at Victoria to the Registrar or Deputy Registrar of the Supreme Court: an advertisement is inserted in the *Gazette* for four issues, after which the service is valid, and the plaintiff proceeds to prove his claim.

Advertisement in *Gazette*.

*40 Vic: c. 109.***STATUTES OF LIMITATION.**

s. 1. In case any suit or action shall be instituted in this colony against any person here resident, in respect of a cause of action or suit which has arisen between such person and some other person in a foreign country, wherein the person so sued shall have been resident at the time when such cause of action or suit shall have first arisen, such suit or action shall not be maintained in any court of civil jurisdiction in this colony, if the remedy thereon in such foreign country is barred by any statute or enactment for the limitation of actions existing in such foreign country.

If foreign statute bars the remedy it is a good defence.

s. 2, provides the form of plea.

**PRINCE EDWARD ISLAND.***30 Vic: c. 18.***SERVICE OUT OF THE JURISDICTION.**

s. 12. The same as English C. L. P. Act 1852. s. 18, except as to the cause of action in respect of which service is allowed, as to which the section runs as follows:—

Action against British subjects.

It shall be lawful for the court or judge, upon being satisfied by affidavit that there is a cause of action which arose within this Island, or in respect of a breach of contract made within this Island, in whole or in part, or intended to be executed in whole or in part, within this Island, or in respect of a contract made and entered into between parties, one of whom, at the time of making such contract shall reside within this Island, and that the writ, etc:

s. 13. The same as English C. L. P. Act 1852. s. 19.

against foreigners.

s. 14. *id:*

s. 23.

affidavits.

*16 Vic: c. 12,***PROOF OF FOREIGN JUDGMENTS.**

s. 3. The same as English Act 14 & 15 Vic: c. 99, s. 7.

## Chapter XII.

Foreign probates.

## 19 Vic: c. 7.

s. 2. The probate of all wills whenever offered in evidence shall be received as *primâ facie* evidence of the execution of the will, of the contents, and of the death of the testator, unless proof to the contrary is offered.

Service on foreign or domestic companies.

## 28 Vic: c. 6.

s. 1. Every writ of summons [in an action brought against any corporation in the Supreme Court, the form of which is provided] may be served on the Mayor, President or other head officer, or on the secretary, clerk, treasurer or cashier of such corporation, or of any body politic, or corporate, not being established or incorporated within this Island, and which may enter into any contract or engagement, or transact any business therein, by their known or accredited agent or officer, every such writ or summons may be served on such accredited agent or officer, or on the person who at the time of such service may be the accredited agent or officer of such corporation, or body politic, or corporate, within this Island; and such service shall have the like effect, in every respect, as the service of such summons on the officers of any corporation, as is herein before provided.

Procedure when no appearance entered.

s. 2. If any corporation should not cause an appearance to be entered, at the return of such writ of summons, or within twenty days after such return, in every case, it shall and may be lawful for the plaintiff in the action, upon affidavit being made and filed in the Supreme Court, of the due service of such writ, to enter an appearance for such corporation, and to proceed thereupon in like manner, as in personal actions against individuals.

Service where no accredited agent within the island.

## 43 Vic: c. 10 (amending 28 Vic: c. 6).

s. 1. In case there is no such accredited agent or officer residing within this Island, then such writ or summons shall either be served upon the known or accredited agent or officer of such corporation, company or body politic or corporate who may have heretofore entered into any contract or engagement or transacted any business in this Island for, or on behalf of such corporation or company or may hereafter do so wherever he resides, or such service may be made upon the president, vice-president, secretary or manager of such corporation at the head office of such company or corporation, and either of such services shall have the like effect in every respect as the service of such summons on the



officers of any corporation or company, as provided for in the act hereby amended.

**Chapter XII.**

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s. 2. Affidavit of service to be made according to 30 Vic: c. 18, s. 14 [*ante p.* 393].

## NEWFOUNDLAND.

[including LABRADOR.]

### *Consolidated Statutes, c. 20.*

s. 7. The same as English C. L. P. Act, 1852, s. 18, except that service out of the jurisdiction is allowed only when the cause of action arises within the jurisdiction.

The section also applies to cases where any defendant resides out of the jurisdiction with no partner or recognised agent therein,

s. 9. The same as English C. L. P. Act, s. 22.

SERVICE OUT OF THE  
JURISDICTION.

in what cases.

Concurrent writs.

### *43 Vic: c. 12*

for the amendment of the administration of justice, introduced the main principles of the English Judicature Act and provided that rules are to be issued, apparently to be based on the English rules.

The rules have not as yet been received at the Colonial Office.

### *Consolidated Statutes, c. 23.*

ss: 12. 13. The same as English Act, 14 & 15 Vic:

c. 99. ss: 7. 11.

PROOF OF FOREIGN  
JUDGMENTS.

## III. AUSTRALIAN.

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## NEW SOUTH WALES & NORFOLK ISLAND.

### *17 Vic: No: 21.*

s. 16. The same as English C. L. P. Act, 1852, s. 18

s. 17. *id:* s. 19.

s. 20. *id:* s. 22.

SERVICE OUT OF THE  
JURISDICTION.

As to actions against  
British subjects and  
foreigners.

Concurrent writs.

### *16 Vic: No: 14.*

s. 7, the same as English Act, 14 & 15 Vic: c. 99, s. 7.

PROOF OF FOREIGN  
JUDGMENTS.

**Chapter XII.**

Australian judgments.

*The Australasian Creditors Act [19 Vic: No: 12]*

to give further remedies to creditors against persons removing from one Australasian colony to another. A judgment from one of the other colonies, on being filed in the Superior Court of New South Wales, becomes as effectual as a judgment of that court, and execution may issue upon it.

This Act resembles in its operation the Judgment Extension Act, 1868, of the United Kingdom [*cf.* chapter xi.].

**VICTORIA.**SERVICE OUT OF THE  
JURISDICTION.Actions against British  
subjects.*Judicature Act, 1883. [47 Vic: No: 761]*

adopts the main principles of the English Judicature Act, with the orders and rules.

s. 59. is modelled on s. 18 of the English Common Law Procedure Act 1852, incorporating however the principles of Order XI. rule 1 [1875].

Against foreigners.

s. 60. the same as English C. L. P. Act, 1852, s. 19.

One form of writ may be  
substituted for another.s. 61. *id.* s. 21.

Concurrent writs.

s. 62. *id.* s. 22.

in what cases.

Order XI. rule 1. The same as English O. XI. r. 1. [1875].

circumstances to be con-  
sidered by judge.rule 1a. *id.* r. 1a. „

substituting ‘if resident in any Australasian colony’ for ‘if resident in Scotland or Ireland.’

affidavit.  
time for appearance.  
Service of notice in lieu  
of writ.

rule 3. The same as English O. XI. r. 3. [1875].

rule 4. *id.* r. 4. „rule 5. *id.* r. 5. „

Order II. rules 4 and 5, and Order VI. rule 2, are the same as the corresponding English Orders [1875].

*25 Vic: No: 274.*

Australian judgments.

s. 307, corresponds with the Australasian Creditors Act of the other colonies: [see *supra*, New South Wales].

s. 308, provides the method of obtaining execution in cases arising under the preceding section.

PROOF OF FOREIGN  
JUDGMENTS.*27 Vic: No: 197.*

ss: 20, 31. The same as English Act, 14 &amp; 15 Vic:

C. 99, ss: 7. II.

[s. 20 concludes thus:—And every such copy shall be *prima facie* evidence of the original thereof, in like manner as if such original were produced and proved in due course of law.]

The copy of probate of an English (or foreign) will is not sufficient: the original probate or an exemplification under seal of the court must be produced and deposited in the court. (*in the goods of Whittaker.* 2 W. & W: I. E. & M. 114).

And further, evidence that the foreign court had, in the particular case, jurisdiction to grant the probate, must be given.

The facts should be proved, where reasonably practicable, by affidavits made before Commissioners of the court, even where Imperial or Colonial Acts have made other evidence admissible. (*in the estate of Von Stieglitz.* 3 Vic: L. R: I. P. & M. 35).

## QUEENSLAND.

*Judicature Act, 1876.* [40 Vic: No: 6]

adopts with slight variations the English Judicature Act with the orders and rules.

Order II. rule 4. A writ of summons for service out of the jurisdiction or of which notice is to be given out of the jurisdiction may be issued without leave.

No leave required to serve out of the jurisdiction.

rule 5. The same as English O. II. r. 5. [1875].

Forms of writ, and notice of writ, the same as English forms.

rule 6. Time for defendant's appearance is to be limited as follows: for

Time to be allowed to defendant for appearance.

New South Wales or Victoria . . . one month.

Tasmania or South Australia . . . six weeks.

New Zealand or Western Australia . . . two months.

Elsewhere . . . six months.

Order VI. rule 2. The same as English O. VI. r. 2. [1875].

Concurrent writs.

Order XI. rule 1. The same as English O. XI. r. 1. „

SERVICE OUT OF THE JURISDICTION.

rule 2. In case any defendant being a British subject is residing out of the jurisdiction it shall be lawful for a court or a judge upon being satisfied by affidavit that the cause of action is one in which under the last preceding rule a writ may be served out of the jurisdiction, and that the writ was personally served upon the defendant, or that reasonable efforts were made to effect personal service thereof upon the defendant and that it came to his knowledge and either that the defendant wilfully neglects to appear to such writ, or that he is living out of the jurisdiction of the court in order to defeat and delay his creditors to direct from time to time that the plaintiff shall be at liberty to proceed in the action in such manner and subject to such conditions as to the court or judge may seem fit.

in what cases.  
As to actions against British subjects.

**Chapter XII.**

Notice of writ to be served on foreigner.  
Service of notice of writ.

Order XI. rule 3. Notice of writ to be served on foreigner out of the jurisdiction.

rule 4. The same as English O. XI. r. 5. [1875].

**PROOF OF FOREIGN JUDGMENTS.**

*16 Vic: c. 14.*

s. 7, the same as English Act, 14 & 15 Vic: c. 99, s. 7.

Australian judgments.

*The Australasian Creditors Act. [19 Vic: c. 12.]*

[See New South Wales, p. 396.]

## **TASMANIA, (or VAN DIEMEN'S LAND).**

**SERVICE OUT OF THE JURISDICTION.**

[including the **FURNEAUX GROUP** and **KING ISLAND.**]

Actions against British subjects.

*18 Vic: No: 9.*

s. 17. The same as English C. L. P. Act, 1852, s. 18.

against foreigners.

s. 18. *id:* s. 19.

concurrent writs.

s. 22. *id:* s. 22.

*The Inter-Colonial Judgments Act, 1878. [42 Vic: No: 8]*

Australian judgments.

standing in the place of the old Australasian Creditors Act (21 Vic: No: 20). [See New South Wales, p. 396.]

The new Act is the same as the old one in its effect, providing for the execution of the judgments of the other Australasian colonies, but it contains more details as to the registration of the judgment.

*The Inter-Colonial Probate Act, 1879. [42 Vic: No: 26.]*

Australian probates and administrations.

An enactment similar to the preceding one relating to probates and administrations granted in the other Australasian colonies.

s. 2. Probates and administrations granted in the other colonies are to be of like force as if granted in Tasmania, on being resealed.

s. 3. The seal is not to be affixed till the duty is paid: and as to administration till a bond is entered into.

## **SOUTH AUSTRALIA.**

*41 & 42 Vic: No: 116*

adopts with slight variations the English Judicature Acts.

The orders and rules have not as yet been received at the Colonial Office, but it is presumed that they will resemble the English orders.

*No: 2 of 1852.*

ss: 5. 9. The same as English Act, 14 & 15 Vic:

c. 99, ss: 7. 11.

*The Australasian Creditors Act.* [No: 9 of 1855—6.]

[See New South Wales, p. 396.]

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### PROOF OF FOREIGN JUDGMENTS.

Australian judgments.

*The Inter-Colonial Probate Act.* [No: 137 of 1879.]

[See Tasmania, p. 398.]

The provisions of this Act extend to probates and administrations of the United Kingdom. Probates and administrations of Australia, and of United Kingdom.

## WESTERN AUSTRALIA.

*The Supreme Court Act, 1880.* [44 Vic: No: 10]

adopts with slight variations the English Judicature Act.

The orders and rules have not as yet been received at the Colonial Office, but it is presumed that they will resemble the English orders.

*16 Vic: No: 9.*

ss: 7. 8. The same as English Act, 14 & 15 Vic:

c. 99, ss: 7. 11.

### PROOF OF FOREIGN JUDGMENTS.

Australian judgments.

*The Australasian Creditors Act.* [19 Vic: No: 13.]

[See New South Wales, p. 396.]

*The Foreign Probate Act.* [43 Vic: No: 5.]

The provisions of this Act resemble those of Tasmania [*ante* p. 398] and extend to probates and administrations of the whole of the British Empire. Probates and administration of Australia, and of the United Kingdom, and Colonies.

The Act is set out in full in the Appendix.

## NEW ZEALAND.

[consisting of NORTHERN, MIDDLE and STEWART'S Islands.]

*The English Laws Act, 1858.* [21 & 22 Vic: c. 2]

declares the law in force in England up to January 14, 1840, to be the law of the Colony.

*46 Vic: No: 29.* [Code of Civil Procedure.]

s. 27. It shall be lawful for any person in whose favour any judgment, decree, rule or order, whereby any sum of money is Judgments of courts in H. M.'s dominions may be registered and execution issue upon them.



**Chapter XII.**

made payable, has been obtained in any court of any of Her Majesty's dominions, to cause a memorial of the same containing the particulars hereinafter mentioned, and authenticated by the seal of the court wherein such judgment, decree, rule, or order was obtained, to be filed in the office of the court; and such memorial being so filed shall thenceforth be a record of such judgment, decree, rule, or order, and execution may issue thereon as hereinafter provided: Provided further that every seal purporting to be the seal of any such court shall be deemed and taken to be the seal of such court until the contrary is proved, and the proof that any such seal is not the seal of such court shall lie upon the party denying or objecting to the same.

Form of memorial.

s. 28. Every such memorial shall be signed by the party in whose favour such judgment, decree, rule or order was obtained, or his attorney or solicitor, and shall contain the following particulars, that is to say, the names and additions of the parties, the form or nature of the action or suit, or other proceeding, and, when commenced, the date of the signing or entering-up of the judgment, or of passing the decree, or of making the rule or order, and the amount recovered, or the decree pronounced, or rule or order made, and, if there was a trial, the date of such trial and amount of verdict given.

Mode of obtaining execution.

s. 29. It shall be lawful for the court or any judge thereof, upon the application of the person in whose favour such judgment, decree, rule, or order was obtained, or his attorney, to grant a rule or issue a summons calling upon the person against whom such judgment, decree, rule, or order was obtained, to show cause, within such time, after personal or such other service of the rule or summons, as such judge or court shall direct, why execution should not issue upon such judgment, decree, rule, or order, and such rule or summons shall give notice that in default of appearance execution may issue accordingly; and, if the person served with such rule or summons does not appear, or does not show sufficient cause against such rule or summons, it shall be lawful for the said court or judge, on due proof of such service as aforesaid, to make the rule absolute, or to make an order for issuing execution as upon a judgment decree, rule or order of the court, subject to such terms and conditions, if any, as to such court or judge may seem fit; and all such proceedings may be had or taken for the revival of such judgment, decree, rule, or order, or the enforcement thereof by and against persons not parties to such judgment, decree, rule, or order, as may be had

for the like purposes, upon any judgment, decree, rule, or order of the court.

**Chapter XII.**

Second schedule :—

*Code of Civil Procedure.*

s. 47. When a defendant is beyond the limits of the colony, if Service on agent. he have an attorney or agent authorised to transact his affairs generally, and to defend actions on his behalf, the writ may, by leave of the court, be served upon such attorney or agent, subject to such terms as the court may think right to impose.

**SERVICE OUT OF THE COLONY.**

**SERVICE OUT OF THE  
JURISDICTION.**

s. 48. The writ of summons may be served out of the colony in what cases. by leave of the court—

(1) When any act for which damages are claimed was done within the colony.

(2) When the contract which is sought to be enforced or rescinded, dissolved, annulled, or otherwise affected in any action, or for the breach whereof damages or other relief are or is demanded in the action, was made or entered into or was to be wholly or in part performed within the colony.

(3) Whenever there has been a breach within the colony of any contract, wherever made.

(4) Whenever it is sought to compel or restrain the performance of any act within the colony.

(5) Whenever the subject-matter of the action is land, stock or other property situated within the colony, or any act, deed, will or thing affecting such land, stock or property.

s. 49. the same as English Order XI, rule 1a [1875].

circumstances to be con-  
sidered by judge.  
affidavit.

s. 50. *id:* rule 3 „

s. 51. Any order giving leave to effect such service shall fix the time within and the place at which the defendant is to file his statement of defence, and the sittings of the court at which the action is to be heard. time for defence.

**SERVICE GENERALLY.**

s. 52. In any case not provided for by these rules service shall be effected in such manner as the court shall direct.

**PROCEEDING WITHOUT SERVICE.**

s. 53. In actions founded on any contract made or entered into, or wholly or in part to be performed within the colony, on proof in certain actions on  
contract if defendant is  
absent service may be  
dispensed with.

**Chapter XII.**

that any defendant is absent from the colony at the time of the issuing of the writ, and that he is likely to continue absent, and that he has no attorney or agent in the colony known to the plaintiff who will accept service, the court may give leave to the plaintiff to issue a writ and proceed thereon without service, on giving security to the Registrar of the court by bond containing, besides such other stipulations as the court may think proper, a condition to pay to the Registrar all such sums as the defendant shall recover in the action in case the judgment given in the action shall afterwards be set aside, together with the costs sustained by the defendant.

Judge to fix time for  
statement of claim.

s. 54. When it is intended to proceed under the last preceding rule, the times and places for filing the statement of claim and for the trial of the action to be named in the writ of summons shall be fixed by the judge on giving leave to proceed.

publication of service.

s. 55. After leave to proceed under s. 53 has been obtained, the writ of summons must be published three times at least in a newspaper to be appointed by the court when giving leave to proceed, and no further step shall be taken in the action until after the expiration of eight days from the publication of the last of such advertisements.

action to proceed.

s. 56. When leave to proceed has been granted under s. 53, the plaintiff before he can obtain final judgment in the action must proceed to trial and prove his claim before the court in the same manner as if a statement of defence had been filed by the defendant: Provided that, if the plaintiff does not require the case to be tried before a jury, the judge may direct it to be so tried if he shall think fit.

Judge may order trial by  
jury.

defendant may file  
defence at any time  
before judgment.

s. 57. The defendant may at any time before judgment, either himself or by his attorney or agent, file a statement of defence, and defend in the ordinary way, and in such case the action shall proceed as if the statement of defence had been filed in due course: Provided nevertheless that the court may order the defendant to pay the costs of such of the proceedings up to the time of filing the statement of defence as to the court shall seem fit.

may obtain rehearing  
before three years have  
expired.

s. 58. If, at any time within three years after final judgment has been obtained in the action, an affidavit is filed by or on behalf of the defendant, stating that such defendant had at the time judgment was signed and still has a substantial ground of defence, either wholly or in part, to the plaintiff's action on the merits, it shall be lawful for the court or for a judge thereof, upon motion

## Chapter XII.

by the defendant, to cause the merits so alleged as aforesaid to be enquired into and determined in such manner and form, either summarily or by means of trial, or by means of a new trial of the action, and at such time and place, and under such terms and conditions, and with or without security, as to the court may appear proper.

s. 541. If the sole plaintiff or all the plaintiffs in an action be resident out of the colony, the court may, on the application of the defendant, order security to be given for the costs of the action to the satisfaction of the proper officer, and may order proceedings in the action to be stayed until such security has been given. The defendant must apply promptly after the fact of such residence out of the colony has come to his knowledge.

Security for costs.

*The English Acts Act, 1854.*PROOF OF FOREIGN  
JUDGMENTS.

ss: 7 . 11. The same as English Act, 14 & 15 Vic:  
C. 99, ss: 7 . 11.

*The Inter-Colonial Probate Act. [No: 38 of 1879.]*

The Act applies to the Fiji Islands. [See Tasmania, p. 398.]

Australian probates and  
administrations.

## FIJI ISLANDS.

*No: 14 of 1875*

establishes a Supreme Court of Judicature in the Islands.

s. 26. The Common Law, the rules of Equity, and the Statutes of general application of the United Kingdom at the date when the colony obtained a local legislature, 2 January 1875, to be in force in the colony.

English law in force.

s. 27. The practice in force in England at the same date to be in force in the colony.

English practice in force.

[The English Judicature Act with the rules of 1873 are thus in force, the later Act orders and rules not having as yet been adopted.]

s. 28. Sections 26 and 27 are to apply so far only as the circumstances of the colony and its inhabitants, and the limits of the colonial jurisdiction permit.

Construction of English  
statutes.

To facilitate the application of the laws the court may construe the same with such verbal alterations not affecting the substance as may be necessary to render the same applicable to the matter before the court.

**Chapter XII.**

Australian judgments

*The Inter-Colonial Judgments Act.* [No: 12 of 1875.]

[See New South Wales, p. 396.]

The Colony has been included in the Inter-Colonial Probate Act of New Zealand.

*The Fiji Marriage Act.* [41 & 42 Vic: c. 61 (U.K.)]Fiji Marriage Act,  
(U.K.).

to render valid marriages solemnised in Fiji, before 10 October, 1874.

**IV. WEST INDIES.****JAMAICA.**

[CAYMAN ISLANDS, governed by the laws of Jamaica. 26 & 27 Vic: c. 31 (U.K.).]

*No: 24 of 1879*

introduced the English Judicature Act into the Colony.

*No: 39 of 1879*

promulgated a code of Civil Procedure following in substance the English orders and rules.

SERVICE OUT OF THE  
JURISDICTION.Time for appearance to  
be mentioned in writ.

Concurrent writs.

in what cases service  
allowed.

Affidavit to obtain leave.

Order thereon.

Service on agent  
authorised to bring  
actions.

Service on other agents.

s. 11. In case of service out of the jurisdiction the writ shall require the defendant to enter an appearance to the suit within such time as the court shall have ordered.

s. 18. The same as English O. VI, r. 2. [1875]

s. 32. *id:* O. XI, r. 1. „  
omitting the notice of writ in lieu of writ.

s. 33. *id:* r. 3. „

s. 34. Any order giving leave to effect such service shall prescribe the mode of service: [remainder the same as O. XI, r. 4.]

s. 35. If the defendant has in Jamaica an agent authorised to bring actions for him, the court may order service of the writ and subsequent proceedings to be made upon the agent. The plaintiff may elect to proceed under this or under s. 32.

s. 36. If the defendant carries on in Jamaica any estate or business and has no known agent on whom service can be ordered under s. 35, and the action is one which in the opinion of the court or judge may properly proceed under this section, service of the writ and subsequent proceedings may be ordered on any



servant or agent in Jamaica carrying on the estate or business, in such manner and in such place as to the court or judge seems fit. The court may order advertisements in newspapers if it thinks fit. The plaintiff may elect to proceed under this or under s. 32. The service under ss. 35 and 36 is equivalent in all respects to substituted service on the defendant under s. 23.

## Chapter XII.

### 20 Vic: c. 19.

s. 5. The same as English Act, 14 & 15 Vic: c. 99, s. 7.

PROOF OF FOREIGN  
JUDGMENTS.

### 4 G. II. c. 5.

s. 3. Exemplifications of wills in the United Kingdom and the Colonies, and sent over after probate under seal of the court and afterwards recorded in the Island, shall be sufficient evidence and read and allowed as such, of the title of the parties claiming any lands or estates under such wills so exemplified in all courts of law or equity.

Validity of probates of  
United Kingdom and  
Colonies;

### 34 G. III. c. 11.

s. 2. The probate of any will taken before any officer authorised of United States, to take probate of wills in any of the United States of America, and exemplified under the seal of the State where probate has been taken, shall be as effectual as if probate had been taken before the Ordinary of the Island.

### 28 Vic: c. 14.

The reasons of judgments delivered in the courts of the Island are to be preserved and recorded in a book for reference.

Reasons of judgments to  
be preserved.

## TURKS AND CAICOS ISLANDS.

Annexed to Jamaica by the Turks and Caicos Islands Act, 1873. (36 Vic: c. 6. U.K.)

### Ord: No: 9 of 1852.

s. 8. A copy of the process is to be left at the last abode of a defendant once resident, but who has been absent over twelve months; and an affidavit must be made that the defendant was absent twelve months previous to issuing the writ, and that the cause of action arose previous to his departure.

Service on absent  
defendant.

## BRITISH HONDURAS.

### No: 14 of 1879

adopts with slight variations the English Judicature Act.

**Chapter XII.***No. 15 of 1879. [Code of Civil Procedure.]***SERVICE OUT OF THE JURISDICTION.**

Time for appearance to be mentioned in writ.

Concurrent writs.

In what cases allowed.

Affidavit to obtain leave.

Order thereon.

s. 11. In case of service out of the jurisdiction or out of the colony, the writ shall require the defendant to enter an appearance within such time as the court shall have ordered.

s. 18. The same as English O. VI, r. 2. [1875]

s. 32. *id.* O. XI, r. 1. „  
omitting the notice of writ in lieu of writ.

s. 33. *id.* r. 3. „

s. 34. Any order giving leave to effect such service shall prescribe the mode of service : [remainder the same as O. XI, r. 4.]

**BRITISH GUIANA.**

[including DEMERARA, ESSEQUIBO and BERBICE.]

Roman-Dutch law prevails.

The Roman-Dutch law prevails in the Colony, having been originally in the possession of the Dutch West India Company. (*Steele v. Thompson*, 13 Mo: P. C. C. 280.)

That which was the law of Holland in Grotius' time is to be taken as the Roman-Dutch law in force in the Colony. (*Norton v. Spooner*, 9 Mo: P. C. C. 103.)

[See also Cape of Good Hope, p. 412.]

*Ord. 26 of 1855.*

Service on absent defendant.

s. 25. When a defendant is absent from the colony, service of the writ is to be made upon the defendant's attorney if he has one ; if not, it is to be left at his last known residence or last elected domicile, and published in the official gazette.

**BAHAMAS.**

The Statute 40 G. III. c. 2 declares 'how much of the laws of England are practicable within the Bahama Islands, and ought to be in force within the same.'

**SERVICE OUT OF THE JURISDICTION.**

Actions against British subjects, against foreigners.

*17 Vic: c. 20.*

s. 13. The same as English C. L. P. Act, 1852, s. 18.

s. 14. *id.* s. 19.

*35 Vic: c. 6.*

s. 13. Documents legally admissible in any court in England are admissible to the same extent and for the same purpose in the courts in the Bahamas.

2 G. IV. c. 32.

Chapter XII.

Probates of wills exemplified under the seal of the United States shall be valid as if taken before the Ordinary of the Island. Validity of U.S. probates.

## TRINIDAD.

The Island was taken from the Spanish in 1797. The Spanish Civil Law prevails subject to the Acts of the Executive Government, Orders in Council and Imperial Statutes applying to the Colony. Spanish law prevails.

*The Judicature Ordinance [No: 28 of 1879]*  
adopts the English Judicature Act, with the orders and rules of 1875. SERVICE OUT OF THE JURISDICTION.  
In what cases.

*No: 12 of 1855*  
introduced the Imperial Acts passed up to that year to amend the Law of Evidence; including the Statute 14 & 15 Vic: c. 99, ss: 7. 11. PROOF OF FOREIGN JUDGMENTS.

## WINDWARD ISLANDS.

[BARBADOS to SAINT LUCIA inclusive.]

The Court of Appeal for the Windward Islands sits in Barbados, and was constituted by Consolidated Statutes of Barbados, No: 299.

## BARBADOS.

*Consolidated Statutes, No: 40. [1755]*

provides for service of process against persons absconding or avoiding service, or those who, having estates in the Island, reside beyond the seas and cannot be served. Service on absent defendants.

The affidavit and copy of the order made is to be put up within 14 days at the offices of the Registrar, Secretary and Clerk of the courts, and to be published in the Gazette. In default of appearance the plaintiff's bill may be taken *pro confesso*, and the court may decree upon it. The plaintiff is to give security for repayment in case the defendant appears within 7 years, in which case he is to be served with a copy of the decree, which he is entitled to reopen within 6 months. Publication of order.  
Decree may be reopened within seven years.

If the defendant have an attorney in the Island, the service may be upon him; if he refuse to accept it, the court may appoint one to accept service for him.

**Chapter XII.***Consolidated Statutes, No: 334. [1859]*

Common Law Procedure Act. regulates the procedure of the courts.

*41 & 42 Vic: c. 9*

Foreign probates.

provides that all deeds, wills and other writings proved in the United Kingdom, in any of Her Majesty's dominions, or in any foreign country in manner prescribed by law, are to be deemed sufficiently proved and to be taken judicial notice of in Barbados.

**SAINT VINCENT.***Court Act, 1860.*

Service on absent  
defendants,  
with power of attorney.

s. 16. If the absent defendant have an agent with a power of attorney recorded in the Secretary's or Registrar's office, the service of the writ with a copy of the declaration may be made upon him, or upon some person residing at his most usual place of abode :

without power of  
attorney.

if he has no such agent, the service is to be at the defendant's last place of abode, upon a member of his family or a servant :

with property.

if he have freehold or leasehold property in the Island, the writ and copy of declaration may be affixed for service upon any part thereof :

without property.

if he have none, the same may be nailed to the door of the Court house in Kingston :

actual residence.

an affidavit must be made of *bonâ fide* attempts to serve the writ : but such service can only be made on persons who have actually been resident, and who possess some real or personal property (however small) in the Island.

PROOF OF FOREIGN  
JUDGMENTS.

*Act No: 99.*

s. 7. The same as English Act, 14 & 15 Vic: c. 99, s. 7.

**GRENADA.**

[and the GRENADINES.]

*No: 10 of 1882*

adopts with some variations the English Judicature Act.

*No: 16 of 1882*

established a Code of Civil Procedure based upon the English orders and rules.

SERVICE OUT OF THE  
JURISDICTION.

in what cases.

s. 19. The same as English O. VI, r. 2. [1875]

s. 33. *id:* O. XI, r. 1. „

omitting the service of notice of writ in lieu of writ.

s. 34. The same as English O. XI, r. 3. [1875]

s. 35. *id.* r. 4. ,,

## Chapter XII.

affidavit.

time for appearance.

### *Consolidated Statutes, No: 134. [1874.]*

s. 167. Probate of foreign wills exemplified under seal of the Foreign probates.  
foreign court shall be *prima facie* evidence of the original will.

## TOBAGO.

A charter was granted to the Island 7 October, 1763.

The Act of Tobago, November, 1841, provided that the English Common Law and Statutes of that date suitable to the colony should be in force in the Island.

[*cf.* *The Colonial Bank v. Warden*, 5 Mo: P. C. C. 340.]

### *No: 10 of 1879*

reconstituted the Supreme Court of the Island and adopted the English Judicature Act.

### *No: 11 of 1879*

established a Code of Civil Procedure, based upon the English rules and orders.

SERVICE OUT OF THE  
JURISDICTION.

in what cases.

The service of notice of writ in lieu of writ is omitted.

### *No: 14 of 1869*

adopted the English Law of Evidence, including the Act, 14 & 15 Vic: c. 99, ss: 7 & 11.

PROOF OF FOREIGN  
JUDGMENTS.

## SAINT LUCIA.

The French law prior to June 23, 1803 prevails in the Island. French law prevails.

[As to the construction of French ordinances, see Quebec, p. 386.]

### *The Civil Code Ordinance, 1876.*

s. 14. All British subjects enjoy the same civil rights as natives of the colony except as set forth in the rules respecting domicile. Rights of British subjects.

s. 20. Aliens though not resident in the colony may be sued in its courts for the fulfilment of obligations contracted even in foreign countries. Actions against non-resident aliens: in what cases.

s. 21. Any inhabitant of the colony may be sued in its courts for the fulfilment of obligations contracted in foreign countries, even in favour of a foreigner. Actions against inhabitants: in what cases.



**Chapter XII.**

Security for costs.

s. 22. A non-resident plaintiff is required to give security for costs, unless he has realty in the colony of not less value than £100, free of all charges.

**PROOF OF FOREIGN JUDGMENTS.**

Judgments.

s. 1152. The certificate of any British or Foreign Executive Government, and the original documents and copies of documents hereinafter enumerated, executed out of the colony, are *prima facie* evidence of the contents thereof, without any proof of the seal or signature upon them, or of the authority of the officer granting the same; *viz:*—

Wills and probates.

i. A copy of any judgment or other judicial proceeding of any court out of the colony, under the seal of such court, or under the signature of the officer having the legal custody of the record of such judgment or other judicial proceeding.

ii. A copy of any will executed out of the colony under the seal of the court wherein the original will is of record, or under the signature of the judge or other officer having the legal custody of such will, and the probate of such will under the seal of the court.

Certified copies.

iii. A copy certified by the prothonotary of the copy recorded in his office of any such will and probate at the instance of an interested party and by the order of a judge of such court. The copy of a probate so recorded is also received as proof of the death of the testator.

\* \* \* \* \*

These copies, probates, etc., are held to be genuine unless impugned, and the onus of proof lies upon the party impugning them. The manner of impugning the documents is set forth in the Code of Civil Procedure. [*cf.* Quebec Civil Code, s. 145, p. 386.]

Judicial hypothec.

s. 1923. Judicial hypothec results from judgments of the colonial courts. It also results from judicial suretyship, and from any other judicial act creating an obligation to pay a specific sum of money.

[There is no special mention of foreign judgments as in the Code Napoléon.]

*Code of Civil Procedure, 1879.*

Service on agent of absent defendant.

s. 66. If the defendant has left or has never had his domicile in the colony, and has property therein, the Court or Judge or the prothonotary, upon a return stating that he cannot be found in the colony, may order service upon any known agent of the defendant, when the power of attorney has been duly registered

by the prothonotary, or may allow substituted service, or may order that the defendant appear within two months from the last publication of such order, which must be published twice in the Gazette.

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s. 80. Every party appearing in person is held, by reason of such appearance, to have elected domicile in the office of the prothonotary. Whenever one of the parties who has not appeared by solicitor has, since the commencement of the suit, left the colony, or has no domicile therein, all orders, rules, notices or other proceedings may be served upon him at the prothonotary's office, as being his legal domicile, provided the sheriff alleges in his return that he has made fruitless endeavours to find him, and that, to the best of his belief, he is not within the limits of the colony.

Appearance.  
Service of subsequent papers.

s. 364. The defendant may apply by petition for the revision of any judgment rendered against him by default if he has been personally served beyond the colony within six months of the service.

Revision of judgments by default.

## LEEWARD ISLANDS.

[including by the Leeward Islands Act, 1871 (34 & 35 Vic: c. 107), ANTIGUA and BARBUDA (Act of Antigua, Sept: 1858, confirmed, 22 & 23 Vic: c. 13) MONTSERRAT, SAINT CHRISTOPHER and ANGUILLA, NEVIS, and DOMINICA, with their respective dependencies, and the VIRGIN ISLANDS:—TORTOLA, VIRGIN SORDA, and ANEGADA.]

*No: 2 of 1880 [repealing No: 7 of 1876]*

adopted the English Judicature Act.

*No: 8 of 1876 [Code of Civil Procedure]*

s. 11. In case of service out of the jurisdiction the writ shall require the defendant to enter an appearance to the suit within such time as the court shall have ordered.

SERVICE OUT OF THE JURISDICTION.

Time for appearance to be mentioned in writ.

s. 18. The same as English O. VI, r. 2. [1875]

Concurrent writs.

s. 32. *id:* O. XI, r. 1. „  
omitting the service of notice of writ in lieu of writ.

In what cases services allowed.

s. 33. *id:* r. 3. „

Affidavit to obtain leave.

s. 34. *id:* r. 4. „

Order thereon.

## ANTIGUA.

*Act No: 33. [31 G. III.]*

s. 59. Probate of wills under seal of competent courts of Her Majesty's dominions, when recorded in the Secretary's office,

Probates of H.M.'s dominions.

**Chapter XII.**

shall be good evidence to prove personal bequests in the Island : and when recorded in both the Secretary's and Registrar's offices, to prove devises of realty in the Island, saving always the right of all and every person to invalidate, disprove or set aside the same wills by lawful or equitable causes.

**NEVIS.**

*Act No: 12. [6 G. II.]*

Foreign probates.

s. 24. Probates of foreign wills exemplified under seal of the foreign court shall be *prima facie* evidence of the original will.

**BERMUDA.**

*No: 8 of 1831.*

Service on joint contractors.

s. 2. Service of writ on one or more joint contractors to be good service on all, though some are out of the jurisdiction.

*No: 3 of 1853.*

PROOF OF FOREIGN  
JUDGMENTS.

ss: 7. 8. The same as English Act, 14 & 15 Vic:  
c. 99, ss: 7. 11.

**V. AFRICAN.****CAPE OF GOOD HOPE.**

[including **BASUTOLAND** and the **TRANSKEI** Territory, and **BRITISH KAFFRARIA** (the *British Kaffraria Act, 1865, 28 Vic: c. 5.*)]

The Roman-Dutch law prevails in the colony. (*Denysen v. Mostert*, L. R. 4 P. C. 236. *Aldridge v. Cato*, L. R. 4 P. C. 313.)

Roman-Dutch law  
prevails.

Construction of the law.

The colony was founded in the middle of the 17th century by the Dutch, and they must be assumed to have carried with them the laws of Holland: including the Placaat of the Emperor Charles V, 4th October, 1540. Some of the provisions may have clearly come to an end from their very nature: but the legislature of the colony having power, if it is so minded, to put an end to any part of the ordinances, those parts which remain, however at variance with the principles of similar laws in the United Kingdom, must be enforced, unless they are repugnant to or inconsistent with recent ordinances of the colony. (*Thurburn v. Steward*, L. R. 3 P. C. 478.) [See also *British Guiana*, p. 406].

The ordinances passed by the Dutch Governor and Council, who were the sole legislative power in the colony prior to the cession in 1815, form part of the *lex scripta* of the colony. (*Van Breda v. Silberbauer*, L. R. 3 P. C. 84.)

**Chapter XII.**

Dutch ordinances prior to 1815.

The Acts providing for the administration of justice are No: 21 of 1864, No: 5 of 1879, No: 12 of 1880, but there appears to be no reference in them to service out of the jurisdiction.

By the Imperial Statute 26 & 27 Vic: c. 35 the laws in force at the Cape of Good Hope for punishment of crimes are extended to British subjects in territories in South Africa not within the jurisdiction of any civilised government.

Criminal laws of Cape extended to South Africa

**GRIQUA LAND WEST.**

annexed to the Cape by Act No: 39 of 1877: the Proclamation of October 27, 1871, having previously declared that the laws and usages of Cape Colony were to be deemed the laws of the territory, so far as they should not be inapplicable thereto.

[By the Constitution of the Orange Free State, 1854, it was declared that the Roman-Dutch Law should be the Common Law of the State where no other law had been made by the Volksraad. (*Webb v. Giddy*, L. R. 3 App: Ca: 908).]

**NATAL.**

*No: 10 of 1857*

provides for the better administration of justice in the colony, but there is no reference to service out of the jurisdiction.

**TRANSVAAL.**

The Acts contain no reference to service out of the jurisdiction.

**SAINT HELENA.**

The court was constituted by Order in Council, dated 13 February, 1839.

*No: 1 of 1868 [October 6]*

declares that so much of the law of England as is applicable to local circumstances is in force in the colony.

The Acts do not contain any reference to service out of the jurisdiction.

## Chapter XII.

## WEST AFRICAN SETTLEMENTS.

[SIERRA LEONE to LAGOS inclusive.]

SIERRA LEONE AND  
GAMBIA.

The two settlements were united 19 February, 1866, and a Court of Justice was established :

*No: 9 of 1881*

provides for the better administration of justice in the settlement.

Law. s. 19. The statutes of general application which were in force in England on 1 January, 1880, to be in force in the settlement.

Procedure. s. 25. The rules and orders of court which were in force in England on 6 April, 1880, to regulate the procedure of the Supreme Court of the Settlement.

GOLD COAST AND  
LAGOS.*No: 4 of 1876*

introduced with slight modifications the English Judicature Act : the procedure being based upon the English rules and orders.

SERVICE OUT OF THE  
JURISDICTION.

Order II, rule 5. Service out of the jurisdiction is to be by leave of the court.

Leave of court.  
Concurrent writs.

rule 7. The same as English O. VI, r. 2. [1875]

## Order VI., rule 1.

Plaintiff out of the  
jurisdiction,

Where a plaintiff, on whose behalf or by whom a suit is instituted or carried on, either alone or jointly with any other person, is out of the jurisdiction, or is only temporarily therein, he shall assign a fit place within the jurisdiction where notices or other papers issuing from the court may be served upon him.

to assign place for  
service.

## rule 2.

Court may require  
security in respect of  
counter-claim.

If it shall be made to appear on oath or affidavit to the satisfaction of the court that the defendant has a *bonâ fide* counter-claim against such plaintiff which can be conveniently tried by the Supreme Court, it shall be lawful for the court in its discretion to stay proceedings in the suit instituted by such plaintiff until he shall have given such security to comply with the orders and judgment of the court with respect to such counterclaim as the court shall think fit.



## Order XI, rule 3.

When the suit is against a British corporation or a company, authorised to sue and be sued in the name of an officer or trustee, the writ or document may be served by giving the same to any director, secretary, or other principal officer, or by leaving it at the office of the corporation or company.

## Chapter XII.

Service on British corporation or company.

## rule 4.

When the suit is against a foreign corporation or company, having an office and carrying on business within the jurisdiction, and such suit is limited to a cause of action which arose within the jurisdiction, the writ or document may be served by giving the same to the principal officer, or by leaving it at the office of such foreign corporation or company within the jurisdiction.

Service on foreign corporation or company.

## rule 5.

Where the suit is against a defendant residing out of but carrying on business within the jurisdiction of the Supreme Court, in his own name or under the name of a firm through an authorised agent, and such suit is limited to a cause of action which arose within the jurisdiction, the writ or document may be served by giving it to such agent, and such service shall be equivalent to personal service on the defendant.

When defendant resides out of but carries on business in Colony.

rule 6. The same as English O. XI, r. 1. [1875] omitting the notice of service of writ in lieu of writ.

In what cases service allowed.

rule 7. *id.*

r. 3. „

Affidavit to obtain leave.

rule 8. *id.*

r. 4. „

Order thereon.

[with this addition.] And the court may receive an affidavit or statutory declaration of such service having been effected as *prima facie* evidence thereof.

## VI. MEDITERRANEAN.

## GIBRALTAR.

By a proclamation, 11 December, 1867, it was declared that the law of England in force on 22 August, 1867, was to be considered the law of the colony.

## Chapter XII.

**MALTA, [AND GOZO].***Code of Civil Procedure, 1854.*

(Based upon the Italian and French Codes).

Assumed jurisdiction.

s. 749. *Jurisdiction of the Court*: the jurisdiction extends over

(2). Any individual as long as he is domiciled in the Islands.

(3). Any individual in cases relating to things situate or existing in the Islands.

(5). Parties who have entered into any engagement in the Islands, but only in regard to cases touching such engagement, and when they are present in the Islands.

(6). Parties who although they have entered into a contract in some other country have nevertheless agreed to fulfil the engagements in the Islands; or who have entered into such engagements as must necessarily be carried into effect in the Islands, the parties being present in the same.

(7). All individuals in regard to any engagement entered into in favour of one of Her Majesty's subjects whensoever the sentence can be carried into effect in the Islands.

SERVICE ON ABSENT  
DEFENDANTS.

On Maltese subjects.

s. 752. (1). Natural born or naturalised Maltese subjects and all other persons domiciled in the Islands, being absent therefrom are presumed to be resident in their last place of abode in the Islands.

On foreigners under s.  
749. (3) & (7).

(2). All other of Her Majesty's subjects and foreigners not being domiciled in the Islands in the cases contemplated in s. 749, (3) and (7) are presumed to be resident in the place in which the property exists, notwithstanding the case be not for such reason within the exclusive competence of the court of the aforesaid place.

On agents.

(7). In general all parties who have procurators or agents in the Islands, and those who are permitted to sue and to be sued by the means of procurators or agents are presumed to be resident in the place in which any one of such procurators or agents resides, when the case is brought forward against such procurators or agents.

**CYPRUS.***Ordinance, 21 December, 1878*

established a High Court of Justice for the Island: the Act to be renewed every year.

- s. 14. The English practice and procedure to be in force ; **Chapter XII.**  
 modified in the same manner as in the Fiji Act, s. 28 [p. 403]. English practice in force.  
 s. 108. The court may order the transfer of any case to or from Transfer of cases to or from Ottoman Court.  
 the Ottoman court, if in its opinion it ought to have been  
 instituted or would more properly be carried on in the  
 court to which it is transferred.

## VII. EASTERN.

### CEYLON.

The Roman-Dutch law prevails in the island. (*Lindsay v. Oriental Bank*, 13 Mo: P. C. C. 401 ; *Dias v. De Livera*, L. R. 5 App: Ca: 123.) Roman-Dutch law prevails.

[As to the construction of Roman-Dutch law, see British Guiana and Cape of Good Hope, pp: 406 . 412.]

*No: 9 of 1852.*

ss: 8 . 1, the same as English Act, 14 & 15 Vic:  
 c. 99, ss: 7 . 11.

**PROOF OF FOREIGN  
JUDGMENTS.**

*No: 4 of 1860*

regulates the procedure of the courts, but there is no special  
 mention of service out of the jurisdiction.

*No: 22 of 1871. [Statute of Prescription].*

s. 5. domestic judgments are to be considered satisfied in Prescription of home judgments.  
 10 years.

### HONG KONG.

[including the KOWLOON Peninsula.]

*No: 6 of 1844*

explains the ordinance of 1843, whereby it was enacted that  
 ‘ the Courts of Justice at Hong Kong which are now or shall be  
 ‘ hereafter erected, shall have the same power, jurisdiction and  
 ‘ authority in all matters whatsoever, whether civil or criminal, over  
 ‘ Her Majesty’s subjects within the dominions of the Emperor of  
 ‘ China, or within any ship or vessel at a distance of not more  
 ‘ than 100 miles from the coast of China, that the courts aforesaid

Jurisdiction over British subjects.

**Chapter XII.**

‘have or shall have, over Her Majesty’s subjects actually resident  
‘within Her Majesty’s colony of Hong Kong.’  
and enacts that

all writs and processes for carrying into effect any judgment decree  
or order of the said court shall and may be served and executed  
upon the person or property of the defendant according to the  
ordinance of 1843, notwithstanding such judgment, etc., shall have  
been pronounced or made in respect of matters arising within the  
said Colony.

*No: 13 of 1873. [Code of Civil Procedure].*

cl: viii.

Service on British  
company.

s. 5. In the case of British corporations or companies authorised  
to sue and be sued in the name of an officer or trustees, service  
may be effected by giving the writ to any director, secretary, or  
principal officer, or by leaving it at the office of the corporation  
or company.

Service on foreign  
company.

s. 6. In the case of a foreign corporation or company having  
an office in the colony, and the suit is limited to a cause of action  
which arose within the jurisdiction, the writ may be served on the  
principal officer, or may be left at the office.

Service on absent  
defendant carrying on  
business in colony.

s. 7. If the defendant is out of the jurisdiction but carries on  
business in his own name or in the name of a firm through an  
authorised agent, and such suit is limited to a cause of action  
within the jurisdiction the writ may be served on the agent.

**SERVICE OUT OF THE  
JURISDICTION.**

—  
In what case.

s. 8. Service of the writ out of the jurisdiction is allowed when  
the court is satisfied by affidavit or otherwise that the suit is  
limited to a cause of action which arose in the jurisdiction.

Time for appearance.

s. 9. The court is to fix the time for the defendant’s appearance,  
and give any other directions it may think fit :

The court will receive any affidavit or statutory declaration  
of such service having been effected as *primâ facie* evidence  
thereof.

cl: xi.

Def-ndant to appoint  
agent.

s. 2. When appearance is entered, an agent in the jurisdiction  
is to be specified to accept substituted service of all further process  
while the defendant remains out of the jurisdiction : in default  
thereof, the court may proceed with the suit as if no appearance  
had been entered.

cl: xxix.

Declaration to be served  
with writ.

s. 2. Where service of the writ is allowed out of the jurisdiction,  
the court may order the petition to be filed forthwith, and a copy

under seal of the court to be served on the defendant concurrently with the writ.

Chapter XII.

*No: 2 of 1851.*

The jurisdiction of the Supreme and other Courts of Hong Kong is defined not to extend to civil actions between Chinese subjects when originating out of the colony, unless the defendant has been resident in the colony six consecutive months before the commencement of the action.

Suits between Chinese.

*No: 3 of 1852.*

PROOF OF FOREIGN  
JUDGMENTS.

s. 5. The same as English Act 14 & 15 Vic: c. 99, s. 7.

## MAURITIUS.

[including the SEYCHELLES Islands and RODRIGUES Island.]

The French Civil Code prevails in the Island. (*Lang v. Reed*, 12 Mo: P. C. C. 72; *H.M. Procureur Général v. Bruneau*, L. R. 1 P. C. 169.)

French law prevails.

[As to the construction of French ordinances, see Quebec, p. 386.]

*No: 30 of 1871.*

SERVICE ON ABSENT  
DEFENDANTS.

s. 1. The same as English C. L. P. Act, 1852, s. 18. If a defendant who has been personally served leaves the colony without leaving an attorney or agent to make an appearance for, or represent and defend him, the Court or Judge may order all other orders and papers to be served at his last domicile in the colony.

As to actions against  
British subjects.

s. 2. If a special domicile has been elected by the defendant, not having an attorney or agent, for the particular contract, service may be effected there.

Where special domicile  
elected.

s. 3. If the defendant has left an agent who is unknown he is to be served as if he had no agent.

Where defendant's agent  
unknown.

ss: 6. 7. The curator of absent estates may represent and be served for the defendant, but only if the defendant have property in the Island.

Curator of absent estates  
may represent defendant  
in actions as to his estate.

Personal service upon the defendant may be ordered where it is shown that the sending in the curator is only a pretext for making that officer defendant in a suit having no direct connexion with the estate.



**Chapter XII.**

Time allowed for service.

s. 8. Delays for effecting personal service on the defendant are allowed to the plaintiff as follows :—for

Réunion . . . . .	2 months.
Cape, South African Colonies, and Madagascar . . . . .	4 „
India . . . . .	4 „
Europe . . . . .	6 „
China . . . . .	6 „
Australian Colonies . . . . .	6 „
United States . . . . .	8 „
Elsewhere . . . . .	8 „

Defendants within and without the jurisdiction.

s. 10. Where some of the defendants are within, and some out of the jurisdiction, those within may be sued alone.

PROOF OF FOREIGN  
JUDGMENTS.

The English Act 14 & 15 Vic: c. 99, ss: 7 . 11, is in force.

**STRAITS SETTLEMENTS.**

[SINGAPORE, PENANG or PRINCE OF WALES ISLAND, AND MALACCA.]

The procedure of the courts is regulated by the Courts Ordinances, Nos: 3, 4, and 5 of 1878, by which the English Judicature Acts were introduced.

SERVICE OUT OF THE  
JURISDICTION.

in what cases.

*No: 3 of 1878.*

s. 19. Jurisdiction of the court.

The Supreme Court may try actions in all cases where the persons who are defendants are present in the colony, or the corporate body which is defendant has an establishment or place of business in the colony, and also in the following cases although the defendant is not present, or has not its establishment as aforesaid in the colony, that is to say, if the defendant has property in the colony, or—[here follow the provisions of the English Order XI. rule 1 (1875) with the following changes] :—

the notice of writ in lieu of writ is omitted :

as to contracts, after the words ‘was made or entered into,’ is added, ‘or was to be performed or partly performed’ :

and at the end, is added—

Or, if the cause of action arose in the colony, or if the subject of the proceeding otherwise falls on general principles of international law or comity, to be determined by the law of the colony.

Contracts.

In suits founded on contract, ‘cause of action’ as used in

this section, shall not necessarily mean the whole cause of action; but a cause of action shall be deemed to have arisen with the jurisdiction if the contract was made therein, though the breach may have occurred elsewhere, and also if the breach occurred within the jurisdiction though the contract may have been made elsewhere.

*No: 5 of 1878.*

- s. 41. The defendant is to appear within such time as the court may direct in the case of service out of the jurisdiction. Time for appearance.
- s. 47. The same as English O. VI. r. 2. [1875]. Concurrent writs.
- s. 66. i. Service out of the jurisdiction of the colony of a writ of summons may be allowed by the court in all cases in which the court has jurisdiction, under s. 19 of Ord: No. 3 of 1878.
- ii. The same as English O. XI. r. 3. [1875]. Affidavit to obtain leave;
- iii. *id:* r. 4. „ order thereon.
- Form 7. The same as Form 2 in Part I. of Appendix A. [1875].
- s. 67. The defendant within the time allowed for appearance shall cause an appearance to the suit to be entered for him in the Registrar's office in the settlement in which the writ was issued. Defendant's appearance.
- s. 70. The defendant appearing in person if residing out of the jurisdiction is to give an address for service within two miles of the Court House in the settlement in which the writ was issued. Address for service.

The Straits Settlements ceased to be part of India by the Imperial Statute 29 & 30 Vic: c. 115; and by 37 & 38 Vic: c. 38, the jurisdiction of its courts in criminal cases was extended to offences committed out of the colony at any place in the Malayan Peninsula extending southward from the 9th degree of north latitude, or in any island lying within twenty miles from the coast thereof by any of Her Majesty's subjects or by any person being a subject of any of the native states in the said Peninsula south of the said 9th degree of north latitude, but who is at the time of his committing such crime or offence resident in the said colony or who has been so resident within six months before the commission of such crime or offence.

*20 & 21 Vic: c. 75 [U.K.]*

confirmed the Order in Council dated 28th July, 1856, which vested certain powers and authorities in Her Majesty's consul appointed to reside in the kingdom of Siam for the peace, order, and good government of Her Majesty's subjects being within the

Jurisdiction in criminal cases.

SIAM.

Powers of H.M.'s consul in civil matters.

## Chapter XII.

in criminal matters.

dominions of the kings of Siam, and particularly authority to hear and determine any suits of a civil nature arising in those dominions between a British subject and a subject of the kings of Siam or a subject or citizen of a foreign State in amity with Her Majesty, or between British subjects, subject to an appeal, expressed to be given by the said order, to the supreme court in Her Majesty's possession of Singapore, and also authority to try British subjects charged with having committed crimes or offences within the dominions of the kings of Siam, and power also to cause any British subject charged with the commission of any crime or offence, the cognisance whereof might appertain to such consul, to be sent to Her Majesty's possession of Singapore for trial before the supreme court of the said possession.

In the Order in Council are contained provisions in relation to the trial by the supreme court of the British subjects so sent for trial, and also for the exercise by the supreme court, concurrently with Her Majesty's consul in Siam, of authority and jurisdiction in regard to all suits of a civil nature between British subjects arising within the dominions of the kings of Siam.

### PENANG (or PRINCE OF WALES ISLAND).

The law of England, having regard to the Royal Charters granted to the East India Company in 1807, 1826, and 1855, is to be taken to be the law of Penang so far as it is applicable to the circumstances of the place, and modified in its application by these circumstances. English statutes therefore in their nature inapplicable to Penang are not introduced along with the general law of England. In applying the rules of English law, regard should be had to the habits and usages of the various people residing in the colony.

The English rule against perpetuities, being founded upon public policy, as also the exception to the rule in favour of charitable uses, has passed into the law of the colony. (*Teap Cheah Neo v. Ong Cheng Neo*. L. R. 6 P. C. 381.)

### LABUAN.

The Imperial statute 29 & 30 Vic. c. 115, which separated the Straits Settlements from India, treated Labuan as one of the settlements : in the Colonial Office it is not so treated. There is some doubt therefore whether the Straits Settlements Judicature Acts, 1878, apply to this colony.

The ordinances exist only in MSS; there are two relating to the procedure of the courts : No: 2 of 1850 and No: 3 of 1851.

*No: 2 of 1850.*

s. 7. The court shall have cognisance of all actions or suits which shall or may arise against any person or persons who shall be resident within the colony or its dependencies, or who shall have any debts or estate real or personal within the same, and against the executors or administrators of the same.

## VIII. MISCELLANEOUS.

### CHANNEL ISLANDS.

#### JERSEY.

The law of Jersey is based upon *Le Grand Coutumier du Pays et Duché de Normandie*, contained in '*la Somme du Mancel*,' or *Mancel's Institutes*; but it is in a state of great confusion, as was shown by the Report of the Royal Commission in 1861, and it has been found impossible to present any clear idea of the law of the Island bearing upon the subjects under consideration.

'The Reformed Customs of the Duchy of Normandy are not written laws: they are not Legislative Acts within the letter of which people are to be brought. They are written illustrations, written evidences, authoritative declarations of the unwritten Common Law or custom of the country, and can be looked at as evidence of what the old law was, just as Coke upon Littleton would be looked at as evidence in Maryland or Virginia of what the Common Law of England was, unless it can be shown that some new principle had been introduced by legislative or other sufficient authority in the Duchy subsequent to the separation.' (James, L.J., *La Cloche v. La Cloche*, L. R. 4 P. C. 325.)

In an old book on '*The Laws, Customs and Privileges and their Administration in the Island of Jersey*,' by Abraham Le Cras [London, 1839], it is stated that the charter granted to the Island by King John, 'gives jurisdiction to the Bailiff and Jurats in matters arising within the Isle.' From the cases cited however it would seem that although formerly construed strictly, the courts

## Chapter XII.

have latterly entertained suits in respect of causes of action arising in England.

## GUERNSEY.

[including **ALDERNEY**, **SARK**, and **HERM.**]

The law of Guernsey and its dependencies is similar to the law of Jersey.

## ISLE OF MAN.

*Act of Tynwald, 27 Jan: 54 G. III.*

‘An Act for the more easy recovery of debts contracted out of the limits of the Isle of Man.’

Whereas it is expedient that foreign debts shall be recoverable in the said Isle in such and the like manner as debts contracted within the same, after the promulgation of this Act.

Foreign debts recoverable in the same way as insular debts.

All debts contracted out of the limits of the Isle of Man shall be recoverable in the said Isle in such and the like manner, to all intents and purposes, as if such debts had been contracted between the same parties within the limits of the said Isle : save and except as to all cases of debts or penalties due to the Crown, and as to all cases of persons who have fled from their bail, in any part of Great Britain and Ireland, leaving such bail charged or chargeable there ; and also, save and except as to all cases of persons who have committed offences against the bankrupt laws of Great Britain or Ireland.

And whereas it would tend still further to facilitate the recovery of foreign debts, if the orders, judgments and decrees of the courts of Great Britain and Ireland were to be recognised in the Isle of Man, be it enacted that

Execution may issue on judgment of U. K.

In all cases where any order, judgment or decree shall have been pronounced against any person or persons in any action or suit in any of the courts of Great Britain or Ireland, for the payment of any debt, damage, costs, sum or sums of money, it shall and may be lawful for the Court of Chancery of the Isle of Man, upon the production of an office copy of such order, judgment or decree, and upon such affidavit or affidavits being made as required by the law of the said Isle, in order to obtain an action or process of arrest, to issue and grant the usual action or process of arrest against such person or persons as aforesaid ; and such office copy shall be deemed *prima facie* evidence of the



debt or damage therein mentioned, upon the trial or final hearing of such action.

Chapter XII.

The practice of the Courts in the Island is regulated by 'The Courts Amended Procedure Act, 1876,' but there is no provision made in this Act for service on absent defendants.

*Evidence Act, 1871.*

PROOF OF FOREIGN  
JUDGMENTS.

s. 19. The same as English Act 14 and 15 Vic: c. 99, s. 7.

## FALKLAND ISLANDS.

[including SOUTH GEORGIA].

The English Act 14 and 15 Vic: c. 99, ss: 7. 11, is in force.  
*cf: The Falkland Islands Co: v. R. (2 Mo: P. C. C: N. S. 266).*

PROOF OF FOREIGN  
JUDGMENTS.

## HELIGOLAND.

[including SANDY ISLAND.]

A proclamation was issued by the Governor in 1864 to the effect that 'the last Schleswig-Holstein Code of Civil and Criminal Law issued previous to the year 1864 should serve as the basis for all laws to be passed by the legislature of Heligoland. In all cases where the Legislative Council has passed no law, or where those which have been passed are insufficient, the above-named civil and criminal laws shall be regarded as the laws of this Island.'

[ 'Constitution and laws of Heligoland,' F. Oekter-Stuttgart, 1878.]

Unfortunately there is no Code of Schleswig-Holstein. The old German civil law was in force in 1864 in the dukedoms, prior to their annexation in 1867; and presumably this was intended by the proclamation to be introduced into the Island.

By that civil law, actions on foreign judgments which are final and conclusive in their own country are allowed, reciprocity however being required. The merits of the case are not gone into.

## ASCENSION ISLAND.

A small island in the South Atlantic under the charge and within the jurisdiction of the Admiralty.

## Chapter XIII.

## CHAPTER XIII.

## THE LAWS OF EUROPEAN NATIONS.

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*The Author gratefully acknowledges much valuable assistance in the compilation of this chapter received from the following gentlemen who have corresponded with him: Landrichter Vicrhaus, Dr Alexy, MM: Björck, Brocher, Chunet, Delos, Hindenburg, Sanna; Mr Carpenter of the Foreign Office Library; and Signor Guarducci and Mr Ernest Schuster, for many of the translations from the foreign Codes.*

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FRANCE, Germany and Italy among the nations of Europe, and Brazil among the States of the Western Continent, have devoted the greatest attention to the subject of Foreign Judgments, as will be seen by the numerous extracts from the Codes. But the continental law as expounded by the courts even of these countries seems to a stranger to their systems to be in a somewhat unsettled condition, and consequently very difficult to formulate. Conflicting decisions are the chief cause of this difficulty, but these are inevitable where the decentralisation system is carried to such a length as it is on the continent, producing multiplicity of courts not only of first instance but also of second instance or appeal.

We however come across several new features, Reciprocity, Treaties and Rogatory Letters ; Reconciliation, Courts of 'Cassation,' and 'Tribunals of Commerce ; these we now propose very shortly to notice.

Many countries still insist on reciprocity as a condition precedent to enforcing a judgment emanating from a foreign tribunal : and this is doubtless to a certain extent a correct and scientific basis on which to ground the action of tribunals, for reciprocity lies as we have seen at the root of the whole subject, it is the foundation of the comity upon which the entire fabric of the theories rests ; but it is merely the inception of that comity ; and for a country to act upon that principle alone is to abstain from lending any assistance towards the general advancement to a perfect unanimity upon the question, which it should be the aim of the courts of all nations to promote.

From the nature of the principle reciprocity can only exist between two individuals of the family of nations ; and owing to the varying ideas prevalent in different countries, it follows that the courts of a country in which this rule prevails are unable to adopt any constant practice or rules upon the question ; without any juristic principle to guide it, the court when a foreign judgment is before it, is obliged to adopt the extraordinary course of looking to the law of the foreign country for guidance rather than to its own law ; and thus we may find the same tribunal at one time granting its *exequatur* to a foreign judgment without going into the merits of a case already adjudicated upon : at another time refusing this auxiliary sanction until the whole case has been re-opened and re-argued. But comity is the rule deduced from similar and recurring instances of reciprocity, formulated for the guidance of the whole family, and based upon the hypothesis that the individual members have already agreed each with each to do a certain thing : comity then ordains that that thing shall be done for the benefit of a sister nation quite irrespective of the course which might possibly be adopted by that nation when the positions are reversed.

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Reciprocity,

distinguished from  
Comity.

When therefore reciprocity is required by the provisions of a foreign code, it is not merely the condition stipulated upon for enforcing a judgment of another country, but it is the measure of that enforcement.

The decision of the *Reichsgericht*, given on page 470, is instructive, not only on account of the view taken of and the criticisms passed on English law, but also as pointing very clearly to the real puzzle of the reciprocity question. The Court of Appeal held reciprocity to mean that a judgment coming from a foreign country would only be enforced to the same extent and in the same degree as that country would enforce a judgment from Germany ; for

The two views of  
reciprocity.



## Chapter XIII.

example, if the foreign country allowed the defence of error in law to be raised, that defence would be allowed in Germany to a judgment coming from that country : if another country allowed a defence on the merits to be raised, that defence would be allowed to a judgment coming from that country : This view of the reciprocity condition in the German code virtually cancels all the other provisions, and makes German law dependent on the laws of foreign states : if the foreign country also required reciprocity, a deadlock would be the result. The *Reichsgericht* however held this view to be erroneous, and declared reciprocity to mean, the judgment will not be enforced at all, unless the country whence it comes accords the same effect as is to be accorded to foreign judgments by the German code. This seems to be the more correct view. But the consequence is equally pernicious. Suppose for example Germany allowed defences *a* and *b* to be raised, and the country whence the judgment comes allowed defences *a*, *b* and *c*, or *a* and *c* : in either case the conditions of reciprocity as enunciated by the decision of the Supreme Tribunal would not be fulfilled, and judgments coming from that country would receive no recognition. As it is unfortunately almost impossible to find two countries whose rules on this subject are identical in every respect, this view of reciprocity also virtually cancels all the other provisions, because there is no foreign country which accords to foreign judgments the identical respect as Germany.

Retaliation or *droit de  
retorsion*.

To such an extent has this doctrine been carried, that reciprocity has been distorted into retaliation, the germs of which are evidently to be found in the above decision of the German Court of Appeal. That the Italian courts should act upon the *droit de retorsion* is the more remarkable as the subject has received such great attention at the hands of the framers of the Italian code. The provisions of the 14th section of the Code Napoléon enable a non-resident foreigner to be cited before the French courts on account of engagements entered into by him with Frenchmen either in France or in a foreign country. The corresponding provision of the Italian code is limited to contracts entered into in Italy, and the Italian courts have been loud in their denunciations of this extension of jurisdiction ; they have not merely refused to enforce a judgment obtained against an Italian under the section, but they have decided that it is justifiable for them to admit and act upon the same principle, although it has no place in their jurisprudence, when they are dealing with a Frenchman, ' if not *jure reciprocitatis*, at least *jure*

'*retorsionis*' [see *Debenedetti v. Morand*, J. D. I. P. 1879, p. 72, cited, p. 483]; and, what is still more astonishing, the French courts appear to have approved of this course [see *La Moderazione v. La Chambre d'Assurance Maritime*, J. D. I. P. 1879, p. 345. cited p. 448].

Reciprocity was originally included in the Brazilian Code, but it was struck out by decree in 1880 [*cf.* p. 546].

Treaties however are a step beyond comity, and in this respect Treaties. England is far behind other States, having up to the present time entered into no treaties on the subject. So far back as 1760 we find a convention in existence between France and Sardinia, and in 1787 a treaty between France and Russia: the one to which most frequent reference is made in the French reports is that between France and Switzerland concluded in 1869, which is set out on page 458; the most recent is the convention between Uruguay and Brazil entered into in 1879, set out on page 548.

These treaties replace the comity already existing by providing that executory force shall be given in either country to the judgments of the other: and further they expressly define the power of review reposed in the court to which application is made, in other words the defences which may be raised in the action on the judgment are clearly laid down. The importance of such provisions cannot be over-estimated. These treaties have not at present however gone the length of allowing execution to issue on the judgment by the simple process of registering it [see however the decision of the Italian Court in *Duport v. Chateauvillard*, J. D. I. P. 1879, p. 86, cited *infra* p. 477], nor have they reduced the defences to a minimum: the nations of Europe seem unable to repose sufficient confidence in each other's tribunals; in process of time they may arrive at it, meanwhile we have endeavoured to show that this complete confidence should exist because it is the very first principle involved in the existence of comity.

M. Asser (R. D. I. 1875, p. 388) writing with reference to the M. ASSER'S opinion. Franco-Swiss Treaty has expressed the same view:—'*Nous croyons que le *pareatis* doit être accordé sans examen préalable, soit de la compétence du tribunal qui a rendu le jugement, soit des formalités de procédure, soit pour vérifier si le juge étranger a appliqué la loi applicable d'après les règles du traité.*'

It may not be inappropriate to notice here the theory put forward by M. Fiore in his work '*Sulle sentenze e sugli atti nei paesi stranieri, com e siano efficaci e come si eseguiscano*' (Pisa,

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M. FIORE'S opinion.

1874). Foreign judgments are enforced not owing to comity, nor to reciprocity, nor to a fiction considering all countries united in one for this matter, but to the existence of a '*société de droit entre les nations*.'

M. SILVELA'S opinion.

M. Silvela's apology (J. D. I. P. 1881, p. 25) for the international jealousy which marks the decisions of the courts of some nations upon this subject must also be noted:—'Bien qu'elle 'découle des principes universellement reconnus, la justice ne 'peut pas prendre la forme concrète d'un jugement sans subir plus 'ou moins l'influence des habitudes, des coutumes, des idées 'prédominantes dans le pays où ce jugement est prononcé; c'est 'ainsi qu'on doit s'expliquer les appréciations injustes et contradictoires dont les tribunaux d'une nation sont souvent l'objet de 'la part des étrangers.'

We find also treaties existing between nations mutually to exempt their subjects from being required to find security for costs when before the courts of the other nation: for example, between France and Spain, 7 Jan: 1862. [sec p. 458.]

Rogatory letters.

Rogatory letters (*commission rogatoire*) are intended to replace a formal action on a foreign judgment in another country; they emanate, at the instance of the party, from the tribunal whence the judgment comes and are addressed to the tribunal whose assistance is invoked. The practice of obtaining execution by rogatory commission, noticed by Sir R. Phillimore [*ante* p. 12], rests on the simplest form of the theory of foreign judgments; this is as we have pointed out, one state asks another to lend the aid of its courts to enforce a sanction which itself is powerless to enforce. What the result would be if such a commission were addressed to an English court is difficult to say, it would probably not be recognised. These commissions however are more generally used in conformity with the terms of a treaty, in which the form itself is sometimes provided, as in the case of Bolivia and Peru [p. 548]. The letters would be accompanied by a formal transcript of the judgment required to be enforced, authenticated, in nearly all instances, as to its contents and the signatures attached to it according to the law of the country whence it proceeds. Where it has been possible to procure it the necessary authentication required in each country will be found under the respective sections. [On this subject *cf.* J. D. I. P. 1882, p. 397.]

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Reconciliation.

With regard to the judicial constitution in force in continental nations, we may notice first the office of conciliator: his functions vary in different states; in some all suits have to be brought before him before they go to the court, his duty being purely to bring about a reconciliation if possible; in others he is a judge of first instance in small disputes.

Secondly the division of the tribunals of first instance into Civil and Commercial Courts which is almost universal on the continent. Tribunal de Commerce. The commercial jurisdiction generally extending over commercial contracts, bills of exchange, bankruptcy, the sale of vessels, damage, and marine insurance: The question whether the suit for *exequatur* on a foreign judgment should be taken before a civil or commercial tribunal varies in different countries [*cf.* J. D. I. P. 1883, p. 71].

Lastly the distinction, also almost universal, between the Courts of Appeal and the Courts of Cassation. Cour de Cassation. The English equivalent to 'cassation' is 'quashing'; and the functions of the court, usually the highest court of the country, are restricted to quashing the judgments of inferior courts including the Courts of Appeal, '*pour vice de forme et violation de la loi.*'

With very few exceptions there are no traces of distinct legislation existing in the colonies of the European States, and it may be taken generally that these colonies have the same laws as, or a code almost identical with the code of their mother country. Thus the Codes of Civil Procedure of Cuba and Puerto-Rico are based upon the Spanish Code of 1855. Law in the colonies of continental nations.

In some cases however not colonies but provinces have different laws: thus in Spain the provinces of Aragon, Biscay, Catalonia, Majorca and Navarre possess a Common Law different from the rest of the kingdom: such differences however will hardly affect the subject with which we are dealing.

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## AUSTRO-HUNGARIAN EMPIRE.

## AUSTRIA.

[PAUL LOMFARD, J.D.I.P.  
1877, p. 210.]

[Including UPPER and LOWER AUSTRIA, BOHEMIA, BUKOWINA, CARINTHIA, CARNIOLA, DALMATIA, GALICIA, MORAVIA, SALZBURG, SILESIA, STYRIA, TYROL and VORARLBERG, and the COAST DISTRICTS:—GORZ, GRADISCA, ISTRIA, TRIESTE.]

Constitution and Jurisdiction of the courts.

The District Courts (*bezirksgericht*)\* composed of a single judge have jurisdiction in civil matters up to 25 florins (about £2 10s.); up to 500 florins by consent of parties; up to 500 florins in the matter of book debts: in commercial matters up to 25 florins.

The Courts of First Instance (*landesgericht*; *kreisgericht*) have jurisdiction in all matters which would not come before the District Courts.

The Courts of Commerce have jurisdiction in all commercial and maritime matters.

The Courts of Appeal (*oberlandesgericht*) composed of nine judges hear appeals from the District Courts, the Courts of First Instance, and the Courts of Commerce.

The Cour de Cassation (*kassationshof*) is the final Court of Appeal from all the courts.

EFFECT OF FOREIGN  
JUDGMENTS

The general rules of the Austrian courts as regards foreign judgments are based upon the same principles as the Italian.

The law of 20 November 1852 gives the courts power to render foreign judgments executory in the Empire.

Defences

The defences in an action on a foreign judgment may be directed to the following points:—

- i. The competency of the tribunal.
- ii. The regularity in form and procedure.
- iii. Its effect as *res judicata* in its own country.
- iv. That it is contrary to Austrian law. [*Anon.*: J. D. I. P. 1881, p. 169.]

- v. That it is manifestly unjust.

and further, reciprocity is an essential condition.

Hungarian judgments.

With Hungary the fullest reciprocity exists: the judgments of the two countries being mutually enforced by rogatory letters.

\* The foreign names of the courts are always given in the singular.



*Civil Code* [for the German Hereditary Provinces].

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s. 35. A business undertaken by a foreigner in this state, by which he gives rights to others, without binding them mutually, is to be judged of either according to this code, or according to the law of the country, of which the foreigner is a subject, according as the one or the other law mostly favours the validity of the business.

[WINIWATER'S TRANSLATION.]  
Commercial transactions between subjects and foreigners.

s. 36. When a foreigner in this country enters into a mutually binding business with a citizen, it is to be judged of without exception, according to this code. But, in so far as the foreigner concludes it with a foreigner, it is only then to be considered according to this code if it is not proved that at the conclusion of the business another law has been taken into consideration.

s. 37. If foreigners enter into a business in a foreign country with foreigners, or with subjects of these states, they are to be judged of according to the laws of the place, where the business has been concluded; when at the conclusion another law has evidently not been declared decisive.

The certificate of the Austro-Hungarian Consul is required to verify the authenticity of the record of the foreign judgment.

PROOF OF FOREIGN JUDGMENTS.

Austro-Hungarian judgments are, by the law 13 Feb: 1854, authenticated in the following manner: The judgment is to be signed by the Judge of First Instance: this signature is to be verified by the Judge of the Court of Appeal: this by the Minister of Justice: and this in its turn by the Minister of Foreign Affairs.

Security for costs is required from all absent plaintiffs unless they are able to prove poverty.

*Law of 29 March, 1873,*

regulates the admission of foreign assurance companies into the Austrian Empire.

**HUNGARY.**

[including CROATIA, FIUME, SLAVONIA and TRANSYLVANIA.]

[DR. ALBERT ALEXV.]

The Judges of the Communes have jurisdiction in civil matters up to 20 florins (£2).

Constitution and jurisdiction of the courts.

The Judges of the Arrondissements (*jarashiro*) have a summary jurisdiction up to 50 florins, and subject to appeal up to 300 florins: and in all disputes between hotel and inn keepers and travellers.

## Chapter XIII.

The Courts of First Instance composed of three judges have jurisdiction in civil and commercial matters beyond 50 florins and in divorce cases between non-catholics :

they are also the Courts of Cassation from the summary decisions of the Judges of the Arrondissements.

The Court of First Instance at Fiume has sole jurisdiction in all maritime matters.

The Court of Commerce of Buda-Pesth has a jurisdiction limited to commercial matters arising in the capital.

The *Tables Royales*, or Courts of Second Instance, composed of three judges, hear appeals from the Judges of the Arrondissements ; of five judges, from the Courts of First Instance and the Court of Commerce of Buda-Pesth.

The Court of Appeal, or Court of Third Instance, hears appeals from the *Tables Royales* when the decision of the court below has been reversed ; it is also a Court of Cassation from the Court of Fiume.

The Cour de Cassation is the final Court of Appeal from all the courts, except that at Fiume.

EFFECT OF FOREIGN  
JUDGMENTS.

The Hungarian Code requires the strict observance of reciprocity in enforcing the judgments of another country : they will be enforced to the same extent as Hungarian judgments are enforced in that country.

Austrian judgments.

With Austria the fullest reciprocity exists : the judgments of the two countries being mutually enforced by rogatory letters.

English judgments.

As regards English judgments it is believed that evidence and counter-evidence is admitted, and judgment given on the merits of the case according to Hungarian law.

SERVICE ON ABSENT  
DEFENDANTS.*Code of Civil Procedure. 1868.*

*Curator litis* to be  
appointed.

Every absent defendant ought to be represented by a *curator litis*, who is nominated by the Court, and obliged to plead and represent the interest and right of the absent party in the same manner as a barrister instructed by a party to a suit. This *curator absentis* is usually nominated out of the number of barristers who plead regularly in the court in which the action is to be heard. Without such curator no proceeding can take place against an absent defendant. The curator will be nominated in the following cases :—

in what cases.

i. If the plaintiff proves in his bill of complaint or action, by a

certificate of the competent authority (usually a police officer) that the residence of the defendant could not be ascertained :

ii. If the defendant at whose door the summons was nailed has neither family nor servants to whom the contents of the writ could be explained :

iii. If the defendant is out of Hungary and the receipt of the summons is not acknowledged in due time.

The court will nominate the curator in its first order which fixes the time of hearing, and it will order him to accept service of the writ.

Notice of the summons should be inserted in the Official Gazette, and if necessary in foreign newspapers, and also posted in the Hall of the Court. Such publication should mention the cause of action, the day fixed for hearing, the first order of the court, and the name of the curator appointed. The absent defendant is admonished either to give the necessary information to the curator for the conduct of the case, or to appoint another barrister before the time fixed for hearing. Publication of summons.

The plaintiff is required to advance the costs incurred by the appointment of the curator ;—he has also to indicate in his bill of complaint the residence of the defendant or the place where he will most probably be found : and if he wilfully or maliciously conceal the defendant's address, all the proceedings will be null and void.

In actions relating to real property in Hungary, where the owner is an Englishman who has never resided in the country, if no agent authorised to accept service can be found, the writ should be sent through the Hungarian Minister of Justice to the Austro-Hungarian Ambassador in London for service on the defendant. If the receipt is not acknowledged in due time the order of the court and nomination of curator above-mentioned will be inserted in the Official Gazette and in some English paper. Actions relating to realty.

In personal actions foreigners may be sued before the Hungarian courts, and any goods or money due within the jurisdiction may be seized. Attachment in personal actions.

Foreign companies trading in Hungary but having their principal place of business out of the country may be sued through their representative or agent wherever resident ; if there be no agent, wherever their landed property is situate : and if there be no such property, wherever the contract was entered into out of which the cause of action arises. Foreign companies, when they may be sued.

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Assumed jurisdiction.

The Hungarian courts assume jurisdiction over foreigners resident in Hungary for every obligation incurred by them during their residence : and also in respect of contracts entered into by them in a foreign country before their arrival in Hungary, unless it is evident from the nature of the case or from some special agreement that another court has exclusive jurisdiction in the matter. The defendant may in such action plead to the jurisdiction.

[LEON HUMBLET, J.D.I.P.  
1877, p. 339.  
P. NAMUR, *id.* p. 381.  
F. LAURENT, *id.* p. 496.]

Constitution and jurisdiction of the courts.

## BELGIUM.

The *Juge de paix* has civil jurisdiction up to 300 francs (£12), and in certain other special matters.

A Court of First Instance, composed of a president and two judges, sits in each *arrondissement*: its original jurisdiction includes all matters which cannot be decided by the *juge de paix*, the Court of Commerce, and the Court of Referees: and the execution of foreign judgments in civil or commercial matters: an appeal to the court lies from the *juge de paix* in cases involving more than 100 francs. The president of the court has a personal jurisdiction in all urgent matters.

The Court of Referees (*Conseil de prud'hommes*) decides disputes between workmen and employers.

The Courts of Commerce have an appellate jurisdiction from the Court of Referees, and an original jurisdiction in all commercial matters. In *arrondissements* where there is no *Tribunal de Commerce* commercial matters are taken before the *juge de paix*.

There are three Courts of Appeal composed of five judges. Appeals lie from the Court of First Instance, the president of that court, and from the Court of Commerce in cases involving more than 2500 francs. They have certain special jurisdiction in the matter of the reinstatements of bankrupts and in other matters.

The Cour de Cassation consisting of seven councillors is the final Court of Appeal.

## [Law. 9 Sept: 1814.

French judgments.

s. 1. Decrees and judgments pronounced in France and contracts entered into there shall not be capable of any execution in Belgium.

s. 2. Contracts shall have the effect of simple promises.

s. 3. Judgments notwithstanding, Belgian subjects shall be able to contest their rights afresh before the tribunals of the country, either as plaintiffs or defendants.

*Civil Code.*

The Code Napoléon was formerly in force in Belgium: it was however republished with certain modifications, December 1881.

ss: 14, 2123 and 2128 are now omitted.

*Code of Civil Procedure. 1876-7.*

s. 10. The Courts of First Instance have cognisance of judgments given by foreign judges in civil and commercial cases. EFFECT OF FOREIGN JUDGMENTS.

[*i.e.* the Civil Tribunal and not the Tribunal de Commerce.]

If a treaty on the basis of reciprocity be in existence between Belgium and the country in which such judgment has been given, the examination shall bear only on the five following points:— Where a treaty exists.

i. Whether the judgment contain anything contrary to public order according to the principles of public order in Belgium:

ii. Whether the judgment has obtained the force of *res judicata* according to the law of the country in which it was given:

iii. Whether the copy of the judgment produced be duly authenticated according to the law of the said country:

iv. Whether the defendant's rights have been duly respected:

v. Whether or no the foreign court be the only competent court by reason of the nationality of the plaintiff.

These provisions are applicable by analogy to all other *actes étrangers* clothed with executory power abroad, and which it is desired to make of equal force in Belgium.

Thus it will be seen that even if there exist a treaty with the foreign state a judgment of that state is not received with very great favour:—but if there is no treaty, the foreign judgment does no more than fix the competency of the Belgian tribunal, which may then make a complete revision of it; (*Petitdidier v. Boone*. J. 1881, p. 83; *Wibault v. Collignon*. J. 1876, p. 298—a French judgment for costs; *Affaire Bauffremont*. J. 1880, p. 508: 1882, p. 364—a foreign divorce.) It would seem indeed that the old law of William I. cited above, and which is almost in the same words as the old French ordinance of 1629, cited on p. 446, is still in force not only as regards France, against which country it was specially directed, but as regards all other countries. Where no treaty exists.

An action on the original cause of action is allowed. (*Tilkin v. Byrne*. J. 1876, p. 298.)

A foreign judgment determining a pure question of status need not be made executory: it will be recognised and enforced if Judgment of status.



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morality and the laws of public order are respected. (*Chatelat v. Chatelat*. J. 1881, p. 100.)

The fifth sub-section of s. 10 of the code is intended to cut directly against the assumed jurisdiction of foreign courts.

Report of the Commission  
on the Code.

The Commission of the Chambers appointed to report upon the code said that they could not attach an absolute presumption of justice and truth to every judgment proceeding from any particular tribunal of Europe, America, Asia or Africa; and that the right must be reserved to accord the force of *res judicata* to the decisions of the tribunals only of those countries whose judicial organisation offers sufficient guarantees.

Dalloz severely criticises this 'défiance dans l'impartialité des juges étrangers.'

[This remark of the Commissioners much resembles a repealed section of the code of Texas State, which having provided that no action should be brought upon any foreign judgment, thus concluded:—'This Republic not being bound by any international law or comity to give credence or validity to the adjudication of foreign tribunals whose measures of justice and rules of decisions are variant and unknown here.']

SERVICE ON ABSENT  
DEFENDANTS.

in what cases.

s. 52. Foreigners [*i.e.* absent foreigners] may be cited before Belgian tribunals, either by a Belgian or a foreigner, in the following cases:—

- i. In actions relating to immoveables in the kingdom.
- ii. If they are domiciled or resident in the kingdom; or if they have elected to be domiciled in it.
- iii. If the obligation giving rise to the cause of action arises, has been or will be executed in Belgium.

This sub-section applies to all obligations whether *ex contractu* or *ex delicto*; but in torts or quasi torts it is the act itself that creates the obligation, which therefore arises at the time and place where it is committed. Thus in an action on a libel published in Germany and circulated in Belgium, it was held there was no cause of action in Belgium. (*Strauss v. Stern*. J. 1881, p. 74.)

- iv. If the action relates to a succession being settled in Belgium.
- v. If the action relates to questions as to the validity or continuance of seizures made in the kingdom, or as to any other provisional or conservatory measures.

vi. If the cause of action is collateral to a suit already pending before a Belgian tribunal.

vii. If it be a suit to render a foreign judgment or deed executed abroad executory in the kingdom.

viii. If it relate to a bankruptcy started in the kingdom.

ix. If it relate to a guarantee or to a counterclaim when the original demand is pending before a Belgian tribunal.

x. If there are several defendants when one of them is domiciled or resident in Belgium.

The foreigner so summoned may not plead to the jurisdiction.

A judgment by default obtained against a foreigner with neither residence nor goods in Belgium can be executed by means of a *procès-verbal de carence*, notice of which must be given in the usual way; that is, by means of a notice posted at the door of the court of which a copy is to be sent to the defendant's residence. (*Isabey v. De Cartier*. J. 1876, p. 479.)

Execution of judgment by default against a foreigner.

s. 53. When the different circumstances indicated in the present chapter are insufficient for the determination of the question of the competence of the Belgian tribunals with regard to foreigners, the plaintiff may take his suit before the judge of the place where he himself is domiciled or resident.

s. 54. In the cases not provided for by s. 52, the foreigner may, if a Belgian has the same right in the foreigner's country, decline the jurisdiction of the Belgian tribunals; but if he fail to establish this, the judge shall hear and determine the question.

Reciprocity.

This reciprocity may be proved, either by treaties concluded between the two countries, or by the production of laws or documents properly authenticated showing their existence.

A foreigner made bankrupt in the kingdom is presumed to decline to accept the jurisdiction of the tribunals.

Bankruptcy of foreigners.

A foreign bankruptcy will be recognised. In *Woolf v. Coopman's curator* (J. 1878, p. 516), the plaintiff had proved in a bankruptcy in Maëstricht, and had received a dividend: a *saisie-arrêt* which he had issued on a sum in the hands of a debtor in Belgium, to prevent it being paid to the curator was disallowed.

Foreign bankruptcy.

A foreign plaintiff is always required to give security for costs, whether before a Court of First Instance or a Court of Appeal: (*Buret de Longagne v. Rolin*. J. 1881, p. 69), even if there are Belgian co-plaintiffs (*Anon: id:* p. 69), unless his presence as a

Security for costs.

## Chapter XIII.

party is absolutely necessary to his co-plaintiffs (*De la Motte v. Delvigne*. J. 1878, p. 510), or unless the defendant is also a foreigner. (*Becker v. Robbins*, J. 1881, p. 70.)

*Loi du 18 Juin, 1869.*

Rogatory letters.

s. 139. The judges may address rogatory letters to foreign judges; but they may not comply with rogatory letters emanating from foreign judges unless they are so authorised by the minister of justice, they must then give effect to them.

*cf.* *Spaarnaay v. Dewilde*. (J. 1881, p. 70.)

*Loi du 18 Mai, 1873.*

Foreign companies.

s. 128. Joint-stock companies and other commercial associations industrial or financial formed and having their chief office in a foreign country may carry on their business and sue in Belgium.

In an action brought by a company under this section, its existence and capacity according to its own law may be gone into by the defendant. (*Loubatières v. David*. J. 1881, p. 101.)

s. 129. All companies whose principal office is in Belgium are subject to the law of Belgium, although the deed of incorporation was entered into in a foreign country.

s. 130. The sections relating to the publication of deeds and balance sheets [ss: 9—12. 65. 104], and section 66 ('*Société Anonyme*' to be always affixed plainly and in full after the title of the company), are applicable to foreign companies who may found a branch office or any base of operations in Belgium.

It appears from the report of M. Pirmez that the Commission upon this law considered that when foreign companies, made and established abroad, entered into any transaction in Belgium or were concerned in any action there, the Belgian law ought to treat these '*individualités morales*' as it treats ordinary physical beings, that they should be allowed to enter into contracts and to plead, their existence or incapacity being discussed according to the law of their own country.

The Belgian law not having been responsible for the existence of these companies their enquiry should not in such cases be undertaken; those who mix themselves up with them by entering into contracts know that they are dealing with an exotic creation; and they must recover abroad upon their engagements and their guarantees.

**DENMARK.**

[including the Peninsula of JUTLAND and the Islands BORNHOLM, FÜNEN, LOLLAND and SEELAND. Colonies—GREENLAND, ICELAND, FAROE or HORSE ISLAND; and in the West Indies, SANTA CRUZ, SAINT JOHN and SAINT THOMAS.]

[A. HINDENBURG.  
M. GOOS.  
J. D. I. P. 1880, p. 368.]

All disputes are first taken before a Conciliatory Commission composed of one or three members: the commission has no power to give judgment.

Constitution and jurisdiction of the courts.

The Civil Court of Copenhagen is composed of five members; cases under 40 crowns (about £2 4s.) are taken before a single judge.

The Court of Commerce and Maritime Matters of Copenhagen is composed of a president and four assessors; its jurisdiction extends over all commercial and maritime matters unless they are taken by consent of the parties before the Civil Court.

Outside Copenhagen the Court of First Instance is composed of a judge and four lay assessors; the decision of the majority is final up to 20 crowns: in other cases, the appeal from the islands lies to the Civil Court of Copenhagen, from Jutland to the Court of Appeal at Viborg.

This Court of Appeal consists of five judges.

The Supreme Court consists of nine judges; appeals beyond 200 crowns are taken from the Civil Court of Copenhagen, whether in its original or appellate jurisdiction, and from the Court of Appeal at Viborg; and in all cases from the Court of Commerce of Copenhagen.

The principles of Danish jurisprudence are based upon a Common Law in existence prior to 1815, the authoritative commentator upon which is Anders Sandó Orsted, who wrote in the early part of the present century — [‘Eunomia,’ vol: iv. pp: 1—161. 1802—10].

In an action on a foreign judgment the competence of the foreign tribunal will be examined according to the rules of Danish law.

EFFECT OF FOREIGN JUDGMENTS.

The court will also enquire whether the defendant had those guarantees for a fair judgment which are considered necessary in Denmark.

If these tests are satisfied the judgment will not be executed directly, although it will be considered a binding contract between the parties.

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Defences already rejected by the foreign court will not be received : but pendency of appeal or satisfaction of the judgment may be set up.

A foreign judgment of the place where a contract was entered into, and where the defendant has not pleaded to the jurisdiction of the tribunal, will be enforced.

The Danish courts do not consider the question of reciprocity.

Defences.

There is no express legislation upon the subject at present, but a new code is in course of preparation. The defences admitted by the court are,

- i. That, according to Danish law, the defendant was not in the particular case subject to the jurisdiction :

[thus where the court has assumed jurisdiction, in a manner not recognised by Danish law, as for example under s. 14 of the Code Napoléon, the judgment will not be recognised].

- ii. That the judgment is not executory at home, and that it is subject to appeal :

- iii. That the judgment if executed would violate the principles of Danish law.

Provisions of proposed new Code.

It is believed that the new Code of Civil Procedure has not yet been approved by the Rigsdag. The draft of it contains the following provision.

s. 436. Execution may be effected in virtue of judgments and decrees given by foreign tribunals or by other foreign authorities, competent to do so, provided

(a) That the party could, according to Danish law, have been rendered amenable in the particular case to the tribunal or foreign authority.

(b) That the judgment or decree is executory in the foreign state according to the laws of that country.

(c) That the judgment or decree does not relate to an object the execution upon which by means of the executive power of the state would infringe rights or principles which are inviolable according to the Danish law.

A royal decree will indicate the States which, as regards the execution of judgments and decrees, shall be included in this section.

SERVICE ON ABSENT  
DEFENDANTS.

*Code of 1683. Book 1. Chap. 2.*

s. 19. The principal rules as to the jurisdiction of the court appear to be as follow :—



A man can only be sued in the courts of his domicile. Temporary residence or having an office within the jurisdiction is not sufficient. But if an agreement has been entered into in the jurisdiction to be executed there before the defendant leaves it, he may be sued provided he is residing within the jurisdiction at the time of service of the writ.

s. 20. If the defendant appears and does not plead to the jurisdiction of the tribunal, he will be taken to have expressly waived any objection.

Foreigners in Denmark having goods in the country, which can be seized in execution may be sued in all cases—(Law of 30 November, 1821). *Saisie-arrêt.*

The suit begins with a *saisie-arrêt* on the goods, and a writ served on the possessor, who is presumed to have commercial relations with the owner and to be willing to defend his interests.

The judgment does not condemn the defendant to pay the debt, but only authorises the plaintiff to sell the goods or so much of them as will satisfy his claim: it only relates to the actual goods seized.

Foreign companies having a branch office in Denmark cannot be sued there: they must be sued in the country where the chief office is situate. The companies on the other hand are allowed to sue Danish subjects in the courts of the country, and are not required to give security for costs. *Foreign companies.*

There is a Treaty with Sweden for the mutual enforcement of judgments—25 April, 1861, a written certificate from the judge being necessary to authenticate the judgment. *Swedish judgments.*

## FRANCE.

[Colonies:—CORSIKA, ELBA. African—ALGERIA, BOURBON (RÉUNION), part of GOLD COAST and GABOON, SAINTE MARIE, MAYOTTE, NOSSI-BÉ, SENEGAMBIA. American—SAINT BARTHOLOMEW, GUADALOUPE, MARTINIQUE. West Indies—FRENCH GUIANA (CAYENNE), SAINT PIERRE, MIGUELON. Asiatic—ANTILLES, CHANDERNAGORE, FRENCH COCHIN-CHINA, GOREE, KARIKAL, Northern MADAGASCAR, MAHÉ, ORAN, PONDICHERRY, SENEGAL. Pacific—CLIPPERTON, NEW CALEDONIA, MARQUESAS and LOYALTY ISLANDS. CAMBODGE, TAHITI, TOUAMOTOU, GAMBIER, TOUBOUAI, and the VAVITOU ISLANDS are under the protectorate of France.]

[M. CLUNET.  
M. DE FOLLEVILLE.  
*Revue de l'Institut  
juridique international  
d'Italie*, 1879, pp: 190—  
265.

The Justice of the Peace (*Juge de Paix*) has first to endeavour to conciliate the parties: and secondly to determine disputes up  
*Constitution and jurisdiction of the courts.*

## Chapter XIII.

to 200 francs (£8); also up to 1500 francs in disputes between hotel or inn keepers and others and travellers with regard to hotel bills, travelling expenses, loss and damage of goods, etc.

The Courts of First Instance composed of three judges hear final appeals from the Justices of the Peace beyond 100 francs, and have an original jurisdiction in all matters which would not be heard by them.

The Court of Referees (*Conseil de prud'hommes*) determines disputes between workmen and employers.

The Court of Commerce, composed of three judges, hears final appeals from the Court of Referees, and has an original jurisdiction in all commercial matters, and in bankruptcy.

The Courts of Appeal, composed of seven judges, hear appeals from the Courts of First Instance and the Courts of Commerce in matters above 1500 francs.

The Cour de Cassation, composed of eleven judges, is the final Court of Appeal from all the courts.

[*Ordinance, 15 January, 1629.*

s. 121. Judgments given, contracts or obligations recognised in foreign kingdoms and sovereignties for whatever cause shall have no lien nor receive execution in our kingdom; thus the contracts shall have the effect of simple promises; and notwithstanding the judgments our subjects against whom they may have been given may again contest their rights before our own judges.]

It is understood that this ordinance has been repealed by the Loi du 30 Ventôse, an xii, article 7. The distinction therefore which has always existed in France between foreign judgments in favour of, and those against French subjects should have entirely disappeared. The courts however seem still uncertain as to what course they intend to pursue.

SERVICE ON ABSENT  
DEFENDANTS.

in what cases.

*Civil Code.*

s. 14. A foreigner though not resident in France may be cited before the French courts to enforce the execution of engagements contracted by him in France with a Frenchman, he may be summoned before the tribunals of France on account of engagements entered into by him with Frenchmen in a foreign country.

Corresponding rights will  
not be recognised.

This section, corresponding with the English Order XI, has been the subject of many decisions; among them it is important to notice those which have reference to similar rights assumed by

foreign countries : the French courts have been unanimous in declaring that 'the converse of section 14 cannot be maintained 'without checkmating the sovereign rights on which the rule *actor sequitur forum rei* depends : and section 15 cannot be extended 'to foreign courts. A Frenchman cannot be withdrawn from his 'proper judges except by French law or treaty.' (*Howe v. Bernheim*. J. 1880, p. 104.)

The reasoning of the courts is fully explained in the following judgment :—'L'article 14, Code civile a, il est vrai, apporté une 'dérogation profonde à la règle *actor sequitur forum rei*, en permettant au Français de citer l'étranger devant les tribunaux français 'pour l'exécution des obligations contractées par lui envers eux : 'mais si notre loi a donné aux Français cette marque de haute 'solicitude pour leurs intérêts, elle s'est gardée de déclarer, [has 'refrained from declaring] que, réciproquement, le Français pouvait 'être, contre son gré, traduit devant les tribunaux étrangers pour les obligations par lui contractées envers les étrangers :—Il est évident que le législateur, qui a donné au Français l'éminente prérogative d'être jugé par les tribunaux français, même lorsqu'il 'joue le rôle de demandeur vis-à-vis de l'étranger, n'a pas entendu 'le livrer à la merci des tribunaux étrangers lorsqu'il est lui-même 'actionné comme défendeur.' (*Floating Dock Co. v. Cézard*. J. 1880, p. 105.)

The result is that the courts have held that French members of an English company cannot be sued in England for payment of the amount of their contributions ; therefore a judgment in such cases will not be rendered executory, more especially when they have not been regularly cited before the English judge ; when they have not been cited before him by a public officer appointed for this purpose in France ; when they have not been allowed to defend before the English jurisdiction ; when they have not obtained before the judge the guarantees of a serious defence (*défense sérieuse*). The same principle was acted on in *St. Nazaire Co. v. Allair* (J. 1882, p. 306), the *exequatur* on the English judgment being refused.

French shareholders in English companies.

A foreigner not domiciled in France may not avail himself of this section, more especially if the cause of action has arisen in the foreign country. But a foreigner suing several defendants among whom is a foreigner, may in certain cases summon this defendant before the court seized with the action : but this court is only competent with regard to this foreign defendant, if the action against all the defendants is based upon the same cause of action,

Foreigner not domiciled may not avail himself of the section.

Where one of several co-defendants is a foreigner.

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and if the co-defendants are not joined for the express purpose of bringing the foreigner within this rule. Thus an action on a guarantee may be brought by a Frenchman against a foreigner under this section. (*Helstein v. Shaffauser and Waddington*. J. 1880, p. 474.)

renunciation of the right.

*lis alibi pendens*.

It would seem however that if a Frenchman brings an action abroad against a foreigner he will be held thereby to have renounced his rights under the section: but he may discontinue the action abroad and commence one in France. The plea *lis alibi pendens* is unknown in France, because if there be a renunciation of the right the action in France will not be allowed to be begun. (*Turpin v. O'Neil*. J. 1876, p. 101; *Vanderzée v. Société de Crédit Industriel*. J. 1878, p. 157; *re Arnoult*. J. 1880, p. 191.)

The plea of *lis pendens* can only be received when the second action is before a French tribunal, and not when it is before a foreign one:—‘The French court cannot be held in check by a ‘suit pending before a foreign tribunal’ (*Shaffauser v. Waddington*. J. 1881, p. 256.) Difficulties as to execution and the risk of there being a contrary judgment pronounced abroad cannot be considered any obstacle to the free decision of a French tribunal regularly seized. (*re Rickman*. J. 1875, p. 21.)

The renunciation may be express, as in articles of agreement that disputes shall be decided by a certain court. (*Chen de misfer N. O. d Autriche v. Franck*: J. 1878, p. 37.)

Section 14 applies to obligations resulting from delicts and quasi delicts as well as from contracts. (*Viè v. Compagnie Segovia-Cuadra*. J. 1876, p. 179.)

The jurisdiction assumed over absent foreigners by section 14 of the Civil Code has given rise to much dispute on the Continent; the Italian courts have refused to enforce judgments proceeding upon it, and, although a similar provision does not exist in their code, they have acting *jure retorsionis* applied it to Frenchmen non-resident in Italy: in *La Moderazione v. La Chambre d'Assurance Maritime* (J. 1879, p. 545) the French courts appear to have approved of this proceeding:—‘This provision made with a view ‘of assuring equality of treatment between subjects and aliens is ‘worded in general and absolute terms, which do not allow of any ‘distinction between the case where reciprocity is established by ‘international conventions, which should indeed render this provision useless, and where it results from retaliation, on account ‘of the particular legislation of other States.’

In suits between French subjects and foreigners relating to im-

moveables situate in a foreign country, if the dispute does not relate to a mortgage on the property but to the validity of contracts affecting it between the parties it will be entertained. (*De Boigne v. Gryniewitch*, J. 1877, p. 422.)

s. 15. A Frenchman may be summoned before a French court for engagements contracted by him in a foreign country though with a foreigner.

Sections 14 and 15 apply to foreign companies whether the engagement is to be executed in France or abroad (*Leteneur v. Cie: Noël Sart-Culport*. J. 1875, p. 357. *Préservatrice v. Duval*. J. 1874, p. 127). Foreign companies.

s. 16. In all causes, except commercial ones, in which a foreigner may be plaintiff, he shall be required to give security for costs and damages incident to the suit, unless he possesses immoveable property in France of sufficient value to guarantee such payment. Security for costs.

In suing for an *exequatur* on a foreign award in a commercial matter security is not required (*Guermont v. Société de la Voirie*. J. 1882, p. 615.)

One foreigner cannot require security for costs from another foreigner (*Léonardi v. Porelli*. J. 1880, p. 190).

An English company, notwithstanding the Anglo-French Treaty, must find security (*Compagnie des Engrais v. Ville de Paris*. J. 1876, p. 357).

s. 2123. A judicial lien arises from judgments . . . but the lien cannot in like manner arise from judgments given in a foreign country except to the extent to which they have been declared executory by a French tribunal, without prejudice to contrary provisions which may arise from political laws, or from treaties. Judicial lien.  
Does not arise on foreign judgments.

s. 2128. Contracts entered into in foreign countries cannot create any lien on goods in France, unless there exist contrary provisions in political laws or treaties.

### *Code of Civil Procedure.*

s. 69. (8.) Persons who have no known domicile in France shall be served with the writ at the place of their actual residence : If this is not known, the writ shall be fastened to the principal door of the Hall of the tribunal where the action is brought : a second Mode of service.  
Persons residing but not domiciled in France.



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copy shall be given to the Procureur de la République by whom the original must be signed.

A foreigner may be cited before the tribunal of his last residence even if at the time of the issue of the writ he is absent or is living elsewhere (*Denève v. Fouchet*. J. 1877, p. 422).

If the foreigner has no domicile nor residence, the action should be brought before the plaintiff's tribunal (*Cordua v. Montecatini*. J. 1876, p. 102).

If he reside alternately in France and in another country for commercial purposes, he is properly served at his principal office in France (*Dubost v. Borasio*. J. 1880, p. 102).

If he has no domicile nor residence, but invariably lodges at a certain place when he comes to France on business, he may be served there (*Fermo-Conti v. Morin*. J. 1874, p. 121).

## Foreign companies.

Foreign companies may be cited with reference to contracts entered into in France, in the person and at the domicile of its representative (*Duché v. Raymond*. J. 1876, p. 459), even if its chief place of business is abroad (*Anon.* J. 1874, p. 121).

## Persons resident abroad.

(9.) Persons who inhabit French territory beyond the continent and persons who are settled in foreign countries shall be served at the domicile of the Procureur de la République of the tribunal where the action is brought, by whom the original must be signed, and by whom a copy must be sent, in the first case to the Minister of Naval Affairs; in the second case to the Minister of Foreign Affairs.

## Notice of appeal.

Notice of appeals for abroad are not to be sent to the office of the Procureur Général but to that of the Procureur de la République, whose duty it is to send it to the Minister of Foreign Affairs, whose duty in turn it is to send it on *par voie diplomatique*. The intention of the legislature being, when framing rules for effecting service on absent defendants, that the '*acte signifié à l'étranger touche réellement la partie qu'il intéresse*' (J. 1875, p. 364).

s. 70. The writ is void for informalities.

cf: *Rochaïd-Dahdah v. Poirier* (J. 1881, p. 58).

## Time for defending.

s. 73. [modified by the law of 3 May, 1862]. If the defendant lives outside the limits of Continental France the time allowed for appearance is as follows: for

- i. Corsica, Algeria, Great Britain and Ireland, Italy, the Netherlands and States bordering on France . . . 1 month.

- ii. The remaining European States, and countries on the shores of the Mediterranean and the Black Sea . . . . . 2 months.
- iii. Countries beyond Europe and lying between the Straits of Malacca and Sunda, and on this side of Cape Horn . . . . . 5 „
- iv. Elsewhere . . . . . 8 „
- for countries beyond the sea the times are doubled in case of maritime war.

A foreign company which has endorsed bills of exchange payable in Paris may be served at the domicile elected by it on the bills of exchange, and cannot have the time for defending allowed for its real domicile which has impliedly been renounced (*re Paris Skating Rink Co*: J. 1878, p. 265).

Foreigners outside France are allowed three months for giving notice of appeal (*Vanderzée v. Société industriel*. J. 1878, p. 157).

s. 74. When a writ is served personally in France on a person domiciled out of France, the time for defending shall be the usual time [one week], unless the court sees fit to prolong it.

s. 423. Foreign plaintiffs are not required in commercial suits, to find security for costs and damages to which they may be condemned, even if the suit is taken before the civil tribunal in places where there is no *tribunal de commerce*.

ss: 557-582 apply to *saisie-arrêt* [attachment] and *opposition Saisie-arrêt*. [stop-order].

s. 560. *saisie-arrêt* or *opposition* on goods in the hands of persons not living in France, cannot be served at the domicile of the Procureur de la République, but must be served personally or at the domicile of the party.

s. 1035. French consuls may be charged with the execution of rogatory commissions.  
Rogatory commissions  
consuls.

‘Nos consuls ont en effet sur nos nationaux un véritable pouvoir ‘jurisdictionnel’ (J. 1877, p. 572).

s. 546. Judgments given by foreign tribunals and documents recognised by foreign officials shall only be capable of receiving execution in France in the manner and in the cases ordained by the articles 2123 and 2128 of the Civil Code.

EFFECT OF FOREIGN  
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This section, coupled with the sections of the Civil Code to which it refers, has been held in several cases to give an undoubted right to the French courts to revise the foreign judgment on the merits: 'It was never intended to renounce any of the essential attributes of sovereignty as declared under the old ordinance of 1629' (*re Smith and Anderson, and the City of Meccha*. J. 1882, p. 166. *Dreisch v. Brech*. J. 1878, p. 42. *Louis v. Nokes*. J. 1880, p. 584. *Bartisius v. Jamanti*. J. 1880, p. 585). In *Varlé v. Hava* (J. 1881, p. 156) it was said to be examinable to see if it conforms to the rules of law and justice.

In *Renshaw v. Maitre* (J. 1878, p. 38) however, where a firm of English solicitors demanded an *exequatur* on a judgment for costs against Frenchmen, the defendant was not allowed to set up excess of authority because he had not set it up in England.

Once declared executory, the foreign judgment receives exactly the same force as a home judgment. This results from a comparison of sections 2123 and 1351 of the Civil Code and section 546 of the Code of Civil Procedure.

'Le jugement étranger acquiert des lors, en France, l'autorité 'de la chose jugée (s. 1351) et la force exécutoire : il engendre 'l'hypothèque judiciaire' (s. 2123).

Foreign judgments by default.

With regard to foreign judgments by default, the decisions are somewhat conflicting. In the Floating Dock Co: case cited above (J. 1880, p. 105) the French court refused to enforce the English judgment. In *Brown Johnston v. Massey* (J. 1877, p. 424) the English judgment being by default, it was declared that the ordinary defences remained open. But in *Bullock v. Norris* (J. 1881, p. 430), the court, being satisfied that a judgment by default was a final judgment in England, and that the defendant, an American, had received notice of the writ, and that it did not violate public order, held that there was *res judicata* between the parties and ordered the execution of the judgment. The same course was adopted in *Moir v. Smyth* (J. 1880, p. 192), where the defendant was an English subject. But it is presumed from what has already been said under s. 14 of the Civil Code, that when the defendants are French subjects these cases would not be applicable.

When the demand for *exequatur* is refused the action should be remitted to the proper judge. Thus where an official liquidator had obtained an English balance order against French subscribers, and had failed to obtain an *exequatur* upon it in France, the suit

for payment of the balance due was remitted to the Tribunal de Commerce. (*St. Nazaire Co. v. Allair*. J. 1882, p. 306.)

The *exequatur* will be granted notwithstanding the pendency of appeal, unless it is suspensive (*Smith v. Anderson*. J. 1881, p. 59).

*Tierce-opposition* may be raised against the judgment pronouncing the *exequatur* (*Haussens v. Delorme*. J. 1875, p. 354).

Foreign judgments dealing with the status of a foreigner have the same effect in France as they have by the laws under which they are given, even if the judgment be given by a foreign consul in French territory; they take effect without the necessity of an *exequatur*; thus the appointment of *curatrice exemplaire* of a prodigal was recognised as involving a modification of personal status (*re Drake del Castillo*. J. 1883, p. 51).

A married woman, a foreigner, may sue without marital authority if she has the right to do so in her own country (*Belnot v. Negrão*. J. 1882, p. 619).

A foreign divorce between French subjects will not be recognised. (*Richet v. Richet*. J. 1882, p. 85. *Perinaud v. Edet-vallée*. J. 1883, p. 160.)

A marriage solemnised in a foreign country between a French subject and a foreigner is invalid, if it has not been preceded by the publications prescribed by s. 63, Code Civile; and if it has been celebrated without the consent of the persons determined by the law. (*Dessaint v. Belgrave*. J. 1880, p. 478). The marriage however is not void but voidable: and it would seem that the court will be influenced by the fact of whether it was clandestine or not (*Desaye v. Clement*. *ib.* p. 479).

A marriage contracted according to the laws of a foreign country by a major after publication and respectful act in France, is not tainted with clandestinity by the fact that the celebration abroad was expressly to escape opposition; nor from the fact of the non-transcription of the marriage contract on the register in France. The nullity of marriage will be decided according to the law of the foreign country. (*Baudemon v. Baudemon*. J. 1881, p. 515.)

A foreign trustee in bankruptcy may sue debtors to the estate or form *tierce opposition* to a French judgment prejudicing the rights of the creditors without obtaining an *exequatur*. (*Andersen v. Piccioni*. J. 1883, p. 161; *White v. Lamourcux*. J. 1878, p. 606.)

The bankruptcy abroad of a merchant in business in France will

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not be a reason for staying actions of creditors proceeding in France until the judgment has been made executory, even if they have proved abroad. (*Viellard-Migeon v. Rueff*. J. 1883, p. 50); nor will it be a ground for staying an attachment issued against the bankrupt by French creditors (*Maynard v. Vernhes*. J. 1877, p. 40). But after the *exequatur* has been granted actions will be stayed (*Borelli v. Pagliano*. J. 1877, p. 423): and the creditor must then proceed against the bankrupt's trustee (*Lublin v. Possel. ib.*: p. 424).

A creditor who has proved abroad and received a dividend may not form *tierce-opposition* against the *exequatur* on a foreign bankruptcy (*Lomer v. Letouzé*. J. 1880, p. 476); but a creditor who has issued an attachment may (*Haussens v. Delorme*. J. 1878, p. 354).

The French creditors of a merchant whose chief office is abroad but who has a branch office in France, can make him bankrupt although he has already been adjudicated abroad (*White v. Lamoureux*. J. 1878, p. 606).

PROOF OF FOREIGN  
JUDGMENTS.

## Procedure.

A foreign judgment is proved by the production of an authenticated copy, the signatures to which are certified by the French Embassy or Consulate in the country whence the judgment comes.

Section 2123 of the Civil Code requiring that the whole French tribunal, and not merely the president of the tribunal, should give execution to the foreign judgment, it is argued that a veritable decision is asked of it: to do this it is necessary that the judgment be revised. And further it is argued that it is necessary that such judgments should be closely examined, especially those to which French subjects are parties: 'il est nécessaire, autant qu'il se peut, que la justice française protège ses nationaux contre la malveillance qu'ils pourraient rencontrer peut-être de la part des tribunaux étrangers.'

M. de Folleville however suggests that the code does not require this examination into the merits, but that the French courts should adopt a system similar to that provided in the Franco-Swiss Treaty noticed below [p. 458].

The civil tribunal and not the Tribunal de Commerce is alone able to give executory force to a foreign judgment, even in a commercial suit, and it would seem that even if the judgment be not final it will be made executory by the French courts, subject to the rights of appeal which may be employed against the decision in its own country. (*Derack v. Ghesquière*. J. 1881, p. 255.)



The Court of Appeal can only enforce a foreign judgment in virtue of rogatory letters emanating from the Supreme Court in the foreign country.

But the suit for *exequatur* should be taken in France to a court of equal degree with the foreign court (*Anon.* J. 1877, p. 234).

Where rogatory letters have been sent the judgment cannot be modified or varied if it fulfils the required conditions for the *exequatur*: the court will not take notice of another decision of the foreign court involving a stay of proceedings, but not included in the letters (*Dupuy v. Bonacini.* J. 1880, p. 585).

As to documents recognised (*actes reçus*) by foreign officials, M. de Folleville thus paraphrases section 2128 making it more comprehensible. 'Whenever the document is regular according to the form required by the law of the country where it was made, it shall have by virtue of the rule *locus regit actum*, the same effect in France as if it had been executed before a French official.'

Thus a will made in a foreign country, and probate granted according to the procedure of that country, would be executory in France, according to the terms of section 1134, which says: 'agreements legally entered into become as law to those who have entered into them.'

A point frequently raised before the French courts is their competency to decide suits in which both parties are foreigners: the question has been fully discussed by M. Féraud-Giraud in a paper in the *Journal de Droit International Privé*. 1880. pp: 137, 225. As a general principle one foreigner cannot sue another foreigner in purely personal suits, or in suits relating to moveable property, unless the parties have accepted the French jurisdiction, or if the suit is to enforce the execution in France of engagements contracted in France or even abroad. And further the plaintiff must have been authorised to fix his domicile in France, and the defendant must be resident there without having another domicile abroad. (*Thornhill v. Trant.* J. 1881, p. 59.)

#### Law. 30 May, 1857.

The right to transact business and to plead in France is accorded to joint-stock companies, and other commercial or industrial associations which are subject to the authorisation of the foreign government.

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Anglo-French convention.

On this subject a convention was entered into between France and England, 30 April, 1862, in the following terms :—

s. 1. The high contracting parties declare that they mutually grant to all companies and other associations commercial industrial or financial constituted and authorised in conformity with the laws in force in either of the two countries, the power of exercising all their rights, and of appearing before tribunals whether for the purpose of bringing an action, or for defending the same throughout the dominions and possessions of the other power, subject to the sole condition of conforming to the laws of such dominions and possessions.

s. 2. It is agreed that the stipulations of the preceding article shall apply as well to companies and associations constituted and authorised previously to the signature of the present convention as to those which may subsequently be so constituted and authorised.

The following is a list of the Treaties and Conventions which have been entered into by France in addition to the above :—

with Sardinia, a convention dated 24 March, 1760, continued.

with Italy, 11 September, 1860.

with Russia, 11 January, 1787.

with the Grand Duchy of Baden, 16 April, 1846, renewed by convention, 11 December, 1871, and extended to Alsace-Lorraine.

with Spain, 7 January, 1862, with reference to security for costs not being required from subjects of the High Contracting Parties.

[There was a further Treaty prepared in 1870 between France and Spain with reference to the enforcement of judgments, but it was never signed.]

with Switzerland, 11 June, 1869, ‘sur la compétence judiciaire et l’exécution des jugements.’

*The Franco-Sardinian Treaty, 1760.*

s. 22. In order to engender that reciprocity which should set the seal to this resemblance between the two nations in judicial matters and matters of contract, it is further agreed :—

- i. that in the same manner as liens established in France by public or judicial acts are admitted before the tribunals of H.M. the King of Sardinia, so liens established in future by public contracts, either by ordinances or judgments within the dominions of H.M. the King of Sardinia, shall receive like effect before the tribunals of France :
- ii. that, in order to favour the reciprocal execution of decrees and judgments, the Supreme Courts shall defer on either side with regard to legal formalities (*à la forme du droit*), to requisitions addressed in the objects herein named under the seal of the said courts.

Lastly, that in order to derive the benefit of the judgment of the court, the subjects of the two nations respectively shall only be held on either

side to the same formalities, and to give the same security for costs which are exacted from those who have a right to use the courts, according to the rules obtaining therein.

### *The Franco-Russian Treaty, 1787.*

s. 36. The subjects of the two countries are respectively to have a free and easy access to the courts of justice, and to enjoy the same rights and advantages accorded to subjects.

[This has been held to include an immunity from being required to find security for costs.]

s. 38. The high contracting parties engage reciprocally to grant all possible assistance to the respective subjects against those who shall not have fulfilled the engagements of a contract made and registered according to the prescribed forms: and the Government on either side shall make use of, in case of necessity, the necessary authority to compel the parties to appear in justice in the places where the said contracts were concluded and registered, and to procure the exact and complete execution of everything that was there agreed to.

### *The Franco-Baden Treaty, 1846.*

H.M. the King of the French and H.R.H. the Grand Duke of Baden, being desirous of procuring to their respective states the benefits that accrue from the prompt and regular course of justice, have considered that the best means for arriving at this end would be to conclude a convention which, rendering reciprocally obligatory, in each country, the judgments rendered by the tribunals of the other, should assure their respective execution in France and in the Grand Duchy.

s. 1. Judgments or decrees given in civil and commercial matters by competent tribunals of one of the two contracting states shall carry with them judicial hypothec in the other; they shall moreover be executory when they have acquired the authority of *res judicata*, provided always that the parties interested comply with the provisions of section 3 following.

s. 2. The following tribunals shall be deemed competent:—

- i. That in the arrondissement where the defendant has his domicile or residence; and further
- ii. In real actions, that of the arrondissement in which the subject of the action is situate;
- iii. In matters relating to succession, that of the place where the succession is being determined upon;
- iv. In company actions, when it relates to disputes between the members, or to suits brought by third parties against the company, that of the arrondissement in which it is situate;
- v. That of the arrondissement in which the parties have elected a domicile for the execution of a deed.

s. 3. The party in whose favour the judgment has been given in one of the two States, and who desires to avail himself of it, either by way of *res judicata*, or to bring about the seizure of the goods of the debtor who happens to be in that State, shall be bound to produce for this purpose a copy duly legalised, with a proof of service and a certificate of the Master stating that neither opposition nor appeal exist to the judgment.

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If the registration of the hypothec only is required, a copy of the judgment duly legalised shall be sufficient, and an affidavit to prove service.

On the production of these documents, the judgment shall be declared executory either by the Royal Court of Appeal, or by the Tribunal of First Instance of the debtor's domicile or of the place where the goods are situated, according as the decision shall have emanated from the first or second degree of jurisdiction.

s. 4. The two contracting governments engage to forward summonses or citations, and to execute rogatory commissions, both in civil and criminal matters, so long as the laws of the country offer no opposition, receipts for summonses and citations shall be delivered reciprocally.

s. 5. Rogatory commissions shall be delivered *par voie diplomatique*.

s. 6. The costs occasioned by summonses or rogatory commissions, as well as the postage of letters shall be chargeable to the State receiving the request.

s. 7. The Treaty is to remain in force for 5 years, then for 5 years more, and so on ; it may be dissolved by either State giving notice 6 months before the expiry of any term.

### *The Franco-Spanish Treaty, 1862.*

s. 2. The subjects of the two States shall have mutually free and easy access to tribunals of justice, to claim or defend their rights, in all the degrees of jurisdiction by law established : and under this head shall enjoy the same rights and advantages already accorded or to be accorded to subjects.

[This has been held to include exemption from finding security for costs.]

### *The Franco-Swiss Treaty, 1869.*

#### II. *Execution of Judgments.*

s. 15. Judgments and final decrees in civil or commercial matters, given either by tribunals, or by arbitrators, in one of the two contracting States, shall be, when they have acquired the force of *res judicata*, executory in the other, according to the forms and under the conditions set out in s. 16. following.

s. 16. The party in whose favour the judgment or decree is sought to be executed in one of the two States, should produce to the tribunal or to the competent authority of the place, or of one of the places where the execution should take place ;

i. a copy of the judgment or decree legalised by the respective envoys, or in their absence by the authorities of each country ;

ii. The original writ of summons of the said judgment or decree, or such document as takes the place of the writ in the country.

iii. A certificate given by the master of the tribunal where the judgment has been given, that there is no opposition, appeal or other motion to suspend the effect of the judgment.

On the presentation of these documents, the demand for execution shall be decided upon ; that is to say, in France, by the tribunal assembled in the council chamber, upon the report of a judge assigned by the president and the conclusions of the public prosecutor ; and in Switzerland, by the competent authority in the form by law prescribed. In either case, it shall not be decided upon until a notice has been sent to the party against whom the

execution is sought, of the day and hour on which the demand will be adjudicated upon.

s. 17. The authority seized with the demand of execution shall not enter into any discussion upon the merits of the case. Execution can only be refused in the following cases ;

- i. If the decision emanate from an incompetent jurisdiction :
- ii. If it has been given without the parties being duly cited and legally represented, or by default :
- iii. If the rules of public law or the interests of public order of the country where execution is demanded are opposed to the execution of the decision of the foreign jurisdiction.

The decision granting execution or refusing it shall not be liable to appeal, except by way of cassation, which may be taken before the competent authority, within the delays and according to the forms settled by the law of the country where it has been given.

s. 18. When the judgment involves arrest for debt the tribunal shall not grant execution of this part of the decision, if the law of the country does not allow of it in the case to which the judgment refers.

This measure can in every case only be adopted within the limits and according to the forms prescribed by the law of the country in which execution is sought.

s. 19. The difficulties relative to the execution of judgments and decrees, ordered in conformity with sections 15, 16 and 17, shall be decided by the authority which has decided on the demand of execution.

### III. *Transmission of Writs, Judicial and other documents ; Rogatory Commissions.*

s. 20. Writs, citations, notices, summonses and other documents of procedure prepared in Switzerland and intended for persons domiciled or resident in France, shall be addressed direct by the Swiss government to its diplomatic or consular agent nearest to the Procureur de la République whose duty it is to remit them to their destination. The diplomatic or consular agent will transmit them to this officer, who will return receipts given by the persons to whom the documents are addressed.

Reciprocally, the French government shall address to its diplomatic or consular agent in Switzerland nearest to the Swiss authority whose duty it is to remit them to their destination, writs and documents prepared in France and intended for persons domiciled or resident in Switzerland. The authority to whom the documents shall have been transmitted shall return to the agent the receipts received for them.

s. 21. The two contracting governments engage to procure the execution in their respective territories of rogatory commissions granted by the magistrates of the two countries for examinations in civil and commercial matters, so long as the laws of the country where the execution of them will take place are not in opposition to them.

The transmission of the said rogatory commissions should always be made *par voie diplomatique*, and not otherwise. The costs occasioned by these rogatory commissions shall be charged to the State requested to see to their execution.

The decisions of the courts in French India follow the principles laid down by the courts of the mother country. [*cf.* J.D.I.P. 1879, p. 552.] French colonies.



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HAITI.

[Section 2123 of the Civil Code appears in the Haitian Code, s. 1890: section 546 of the Code of Procedure has also been introduced into that of the Republic.

JAPAN.

It is believed also that a Civil Code based upon the Code Napoléon is being prepared in Japan.]

## GERMAN EMPIRE\*

[including the Kingdoms of PRUSSIA, BAVARIA, SAXONY, and WÜRTTEMBERG: the Grand Duchies of BADEN, HESSE, MECKLENBURG-SCHWERIN, SAXE-WEIMAR, MECKLENBURG-STRELITZ, and OLDENBURG: the Duchies of BRUNSWICK, SAXE-MEININGEN, SAXE-ALTENBURG, SAXE-COBURG-GOTHA, and ANHALT: the Principalities of SCHWARZBURG-SONDERSHAUSEN, SCHWARZBURG-RUDOLSTADT, WALDECK, REUSS (Senior Branch), REUSS (Junior Branch), SCHAUMBURG-LIPPE and LIPPE: the Free and Hanse Towns, LUBECK, BREMEN and HAMBURG: and the Imperial Province ALSACE-LORRAINE.]

The organisation of the courts and the procedure in civil, criminal and bankruptcy matters have been made uniform throughout the empire since the passing of the codes relating to these matters † (the so-called '*Reichs Justizgesetze*') which came into force on the 1st of October, 1879.

## I. ORGANISATION OF COURTS OF LAW.

There are in Germany

1913 Local courts (*Amtsgerichte*)

171 Provincial courts (*Landgerichte*)

28 Superior provincial courts (*Oberlandesgerichte*)

The Imperial court (*Reichsgericht*) in Leipsic.‡

The business of the local courts is transacted by single judges; in the other courts all causes must be tried by several judges sitting

Constitution of the  
courts.

\* The whole of this chapter on German Law has been prepared by Mr Landrichter Vierhaus, of the Ministry of Justice at Berlin [*Reichsjustizamt*]. The sections of the German Code are so concise that, in the opinion of that eminent judge no good purpose would be served by simply transcribing them. Coming from so authoritative a source, the author has felt justified in departing from the plan adopted with the law of other countries, and in substituting the judge's lucid exposition of the law for the chapter he had himself prepared. Mr Ernest Schuster has kindly undertaken the translation of the German text.

† We shall have chiefly to refer to the Code of Civil Procedure. The sections quoted without any further indication are taken from that code.

‡ There is also a Supreme Bavarian court in Munich which takes the place of the Reichsgericht in certain civil matters arising within the kingdom of Bavaria.

together. The latter courts (*Collegial-Gerichte*) are subdivided into divisions, which in the case of the provincial courts are called 'chambers' and in the case of the higher courts are called 'senates.'

In civil causes

The chambers of the provincial courts consist of 3 judges

„ senates „ superior provincial courts „ 5 „

„ „ „ Imperial court „ 7 „

In some of the provincial courts there are special chambers for mercantile causes ; they consist of a presiding judge (who is one of the regular judges of the court) and two merchants (mercantile judges). There are eighty such chambers for mercantile matters in Germany.

Parties may appear in person before the local courts, but they must be represented by an advocate\* in all proceedings before the provincial and higher courts.

## II. JURISDICTION.

### (1.) *Jurisdiction 'quoad materiam.'*

#### A. Courts of first instance.

(a). The local courts have jurisdiction (1) in actions concerning claims of property the value of which does not exceed the amount of 300 marks (£15), (2) without limitation as to amount in certain simple matters in which a speedy termination is important, *e.g.* in disputes between the owners and occupiers of inhabited houses, between masters and servants, between travellers and innkeepers, carriers, boatmen, etc., in actions respecting breaches of warranty as to cattle, etc. These courts also act as bankruptcy courts. Jurisdiction of the courts.

(b). In all civil matters, not included under (a), the provincial courts are the courts of first instance.

#### B. Courts of appeal.

An appeal from a local court is taken to the provincial court, in the district of which the local court is placed ; an appeal from a provincial court is taken to the superior provincial court, in the district of which the provincial court is placed.

#### C. Final appeal.

The decisions of the provincial courts on appeal from the local courts are not subject to any further appeal. In actions concern-

\* The functions of barristers and solicitors are performed by the same persons in Germany.

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ing claims of property, the value of which does not exceed 1500 marks (£75) the decisions of the superior provincial courts are as a rule final; in all other actions there is a further appeal (called 'Revision') to the Imperial court.\*

(2.) *Jurisdiction 'quoad locum.'*

The jurisdiction of German courts extends to foreigners as well as to German subjects. The jurisdiction 'quoad locum' (*Gerichtsstand*) may be *general* (*Allgemeiner Gerichtsstand*) or *special* (*Besonderer Gerichtsstand*).

## A. General jurisdiction.

## (a) dependent on domicil.

Jurisdiction in respect of  
domicil.

A person is *generally* subject to the jurisdiction of the court in the district of which he is domiciled, *i.e.* the court has jurisdiction in all actions against persons domiciled in the district, unless there be an exclusive jurisdiction of a particular court as regards a particular action [ss: 12, 13].

domicil of married  
women.

of children.

The domicil of a married woman, not separated from her husband by a decree of judicial separation, is the domicil of her husband. The domicil of legitimate children is that of the father, the domicil of illegitimate children that of the mother, until they have acquired a domicil of their own [s. 17].

(b) dependent on place of residence.  
(eventually previous domicil.)

persons without domicil.

Persons *without* domicil are *generally* subject to the jurisdiction of the court, in the district of which they actually reside; if no such place be known, or if it be situate outside of the German Empire, the court in the district of which they had their last domicil has jurisdiction over them [s. 18].

(c) dependent on locality of *siège*.

corporations.

Municipal and other corporations, all associations which can be sued in their corporate capacity, and all estates and trust funds which can be sued as such are *generally* subject to the jurisdiction of the court in the district of which their *siège* is situated. If not otherwise determined, the place of the central administration is considered the *siège* [s. 19. (1)].

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\* As to Bavaria, *cf.* note on page 460.

## B. Special jurisdiction.

The special jurisdiction of the courts is the jurisdiction which they have independently of their general jurisdiction and, as a rule, by the side of it, and which is dependent on special circumstances connected either with the person of the defendant or the nature of the action. A person may thus be sued either in the court to the jurisdiction of which he is *generally* subject or in the court to the jurisdiction of which he is *specialy* subject; he may also be *specialy* subject to the jurisdiction of several courts. If in this manner there is a choice of several tribunals, the plaintiff may choose one at his discretion [s. 35].

## Special jurisdiction determined by

## (a) Place of occupation.

Persons having permanent occupations away from the place where they have their legal domicile (students, operatives, apprentices, etc.), are *specialy* subject to the jurisdiction of the court in the district of which they are occupied, as regards actions concerning claims of property [s. 21. (1)].

## (b) Place of establishment.

In the case of branch establishments for industrial, commercial or agricultural purposes, from which business can be transacted immediately, the court of the district has jurisdiction in all actions concerning the business of the particular establishment [s. 22].

(c) *Siège* of corporation.

In the case of corporations, etc., the court to the jurisdiction of which they are *generally* subject [cf: A. (c)], has jurisdiction in actions of the corporation against members as such, or in actions between the members as such [s. 23].

Corporations, etc., being *generally* subject to the jurisdiction of the court in the district of which their *siège* is situated may bring actions against their members as such, and members of corporations may bring actions against each other as such in the same court.

## (d) Situation of personal property.

In the case of actions concerning claims of personal property against persons not being domiciled within the German Empire, the court in the district of which such persons have any property, or in the district of which the object claimed by the action is situate,

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has jurisdiction. The situation of a 'chose in action' is determined by the place in which the debtor resides, and if a security be given, then the place where the security is situate, is also considered a place where property is situate [s. 24]. \*

## (e) Situation of real property.

*(Dinglicher Gerichtsstand.)*

by situation of real  
property.  
(exclusive jurisdiction.)

In the case of actions concerning real property the court in the district of which the property is situate has *exclusive* jurisdiction. In actions concerning charges on real property and easements the place of the property charged or of the servient tenement is considered the place of the property. Personal actions can be instituted against the owner or occupier of real property as owner or occupier in the court of the district in which the property is situate [s. 25, (2)].

## (f) Domicil of a deceased testator or intestate.

by domicil of deceased  
person.

Actions concerning claims of heirs, legatees, next-of-kin, etc., against the estate of a deceased person may be instituted in the court in the district of which the deceased person was domiciled. The actions of creditors may be instituted in the same court, as long as any part of the estate remains within the district, or as long as the estate is undivided [s. 28].

## (g) Place of performance.

in contract.

Actions *ex contractu* may be instituted in the court, in the district of which the place of performance is situate [s. 29]. †

## (h) Place of tortious action.

in tort.

Actions *ex delicto* may be instituted in the court, in the district of which the tortious act was committed [s. 32].

## III. SERVICE ABROAD.

## A. Individual Service.

SERVICE ON ABSENT  
DEFENDANTS.

An action is commenced in Germany by the service of the statement of claim.

\* A trading firm established outside of the German Empire is not taken to be domiciled within the German Empire for the purposes of this rule, though it have a branch establishment or agency in Germany (Decision of the *Reichsgericht* of June 20, 1882, quoted in the *Annalen des Reichsgerichts*, vol. 6, p. 148).

† This rule holds good in the case of a person domiciled abroad having to perform a contract within the German Empire (Decision of the *Reichsgericht* of June 28, 1882, quoted in the *Annalen*, vol. 6, p. 126).



After having been handed to the registrar of the court and marked by him with the date, on which the parties are summoned to appear, it is served on the defendant. This is done by the executive officer (*Gerichtsvolzieher*) if the defendant is domiciled in Germany. If he is domiciled abroad the presiding judge of the court has to see the service effected by addressing a request either to a competent authority in the foreign state or to the German consul or diplomatic representative at his discretion. There are no rules about the manner in which the service is to be effected. The certificate of the foreign authority, or of the German consul or diplomatic representative is sufficient to prove that the service has been effected [s. 182].

#### B. Public citation.

If the defendant's residence be unknown or if in the case of a defendant domiciled abroad the rules laid down with regard to service on absent parties are impracticable, or do not allow any hope of success, a public citation is permissible [s. 186].

Public citation after having been authorised at the suit of the plaintiff by the court before which the action is to be tried is effected by the registrar of the court *ex officio*.\* A certified copy of the paper to be served is posted on the notice board of the court and in the case of a summons an advertisement of an extract from the paper must appear twice in the journal, which usually contains the official announcements of the court and once in the 'Official Gazette of the Empire.' Advertisements in other papers and at more frequent intervals may be ordered by the court [s. 187].

The advertisement must contain the designation of the court, the names of the parties, the relief claimed, the cause of action, the purpose of the citation and the times within which the party cited is to appear [s. 188].

In the case of a summons the service is considered as effected one month after the date, on which the advertisement has been inserted for the last time. The court has discretion to extend the time [s. 189].

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\* In the case of individual service the executive officer or (in the case of absent defendants) the presiding judge acts in a purely ministerial capacity and the question of jurisdiction does not arise; in the case of a public citation however the leave of the court is necessary.

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## IV. FOREIGN JUDGMENTS.

## A. Execution.

EFFECT OF FOREIGN  
JUDGMENTS.

The judgment of a foreign tribunal cannot be executed,\* unless such execution has been declared admissible by a judgment of execution (*Vollstreckungsurtheil*) to be obtained from the court having general jurisdiction over the debtor [*cf.* II. A], or if he be not subject to the general jurisdiction of any court, then from the court, in the district of which he has any property † or in the district of which the object claimed is situate [s. 660].

s. 661.

The judgment of execution is granted by the court without any examination of the legality of the decision. In the following cases, however, it will not be granted.

Defences.

1. If the judgment of the foreign court has not as yet according to the foreign law acquired legal validity (*Rechtskraft*).‡
2. If by the execution an act would be enforced, the enforcement of which is not permissible according to German law.
3. If according to German law the foreign court had no jurisdiction.

4. In the case of a German judgment debtor who did not enter an appearance, unless the summons or similar notice was served upon him personally within the foreign state in question, or within the German empire by means of a rogatory commission.

5. If reciprocity be not guaranteed [s. 661].

The interpretation of reciprocity has been given in a recent judgment of the German Imperial Court (II. *Civil Senat, Entscheidungen* P. VII. No. 124, p. 406), reversing a decision of the Superior Provincial Court of Oldenburg.

The court at Oldenburg had held

(1) That reciprocity is complied with if a judgment of a similar nature is executed in the foreign state in question.

(2) That to establish this fact it must be ascertained whether the objections raised by the defendant in a particular case against

\* Execution is not granted in the case of a foreign judgment unless the contents of the judgment admit of execution both according to the law of the country from which the judgment proceeds and according to the regulations of the German Code of Civil Procedure especially those laid down in the eighth book of that code (Decision of the *Reichsgericht* of April 7, 1883, *Entscheidungen in Civilsachen*, vol. 9, p. 372).

† As to the legal situation of property, *cf.* pp. 463, 464.

‡ The meaning of *Rechtskraft* may be gathered from § 645. A judgment does not acquire '*Rechtskraft*' till the time for giving notice of appeal or for applying for restitution has lapsed.

the execution of the judgment, might have been raised effectively in the foreign state, and if the objections could not have been raised effectively the requirement of reciprocity is complied with.

The *Reichsgericht* (without expressing an opinion on the question raised by the first part of the decision, *i.e.* whether reciprocity is sufficiently complied with if a judgment of a similar nature is executed in the foreign state or whether it is necessary that the foreign state executes all judgments, without any limitations except those imposed by the German law) held that the second part of the decision is erroneous in law, because in Germany a defendant *cannot* raise *any* objections except those allowed by s. 661, and that therefore the question whether any other objections actually raised would have been effective in the foreign state, is perfectly immaterial.

The same decision establishes the fact that the practice of the English courts does *not* satisfy the requirements of reciprocity as defined by the court.

The judgment is set out in full on page 470.

In another decision (1 *C. S. Entsch.*: Part VIII. No. 385, January 26, 1883), the *Reichsgericht* held that the plea of *res judicata* with respect to a foreign judgment is also subject to the requirement of reciprocity as well as the other requirements of §§ 660, 661. It is specially stated in the decision that the law laid down differs from the law practised by the English courts.\*

Awards in the same manner as foreign judgments, can only be Awards. executed if a judgment of execution has decided on their admissibility [s. 868 (1)]. The Imperial court [1 *C. S. Entsch.*: Part V. No. 114, November 5, 1881] has decided that it is immaterial whether the awards have been given in Germany or abroad, whether by German or by foreign arbitrators.†

### B. Proof.

All foreign documents (and consequently foreign judgments) must be recognised as genuine if they are legalised by a German

### PROOF OF FOREIGN JUDGMENTS.

\* For a French translation of this decision cf: Clunet, J. D. I. P. 1883, p. 239, and for a review of the same, Beauchet in the same number p. 272; Beauchet disapproves of the reasoning of the *Reichsgericht*.

† An action for the execution of a foreign judgment may be brought by the personal representatives or assignees of the original plaintiff; in such a case the German judge is competent to decide whether the persons claiming execution are in fact the personal representatives or assignees of the original plaintiff (Decision of the *Reichsgericht* of April 7, 1883, *Entsch. in Civils.*, vol. 9, p. 374).

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consul or diplomatic representative. In other cases the court has to decide whether they are to be considered genuine or not, according to the circumstances [s. 403].

V. SUNDRY REGULATIONS AS TO THE LEGAL RELATIONS OF  
GERMAN INHABITANTS WITH PERSONS LIVING ABROAD.

Capacity to sue  
foreign companies.

A foreigner is capable of being a party to an action, if he is capable either according to the law of his country or according to German law [s. 53]. Hence corporations so capable of suing and being sued in their own country may also sue and be sued in Germany.\*

Security for costs.

Foreigners becoming plaintiffs may be required by the defendant to give security for costs except in actions on bills of exchange and other written documents, or in actions arising out of claims which are entered in the mortgage register of a German court or where a foreign defendant has brought a cross-action or if the plaintiff is the subject of a country the courts of which do not require security for costs from German plaintiffs [s. 102].

Foreigners have to deposit three times the usual amount as security to the State and the action cannot proceed unless the deposit has been made. This rule is subject to the same exceptions as the last.†

Suits in *forma pauperis*.

Foreigners have no claim on the 'assistance judiciaire' unless reciprocity be guaranteed [s. 106 (2)].

Proof of foreign law.

When foreign law has to be administered by a German court, evidence of the foreign law need only be given, in so far as it is unknown to the court; the court is not bound by the evidence given by the parties with regard to it and may make inquiries from other sources [s. 265].

Taking evidence abroad.

When evidence is required abroad, the presiding judge is to address a rogatory commission to the competent authority, unless the German consul can take the evidence required [s. 328]. ‡

The attempt at reconciliation by the judge in divorce suits which is required in other cases before a decree can be issued, is not necessary if the respondent's place of residence is unknown or abroad [s. 373].

Rogatory commission.

If execution of a judgment has to be effected in a country the

\* R.G. 2 C.S. 14 April, 1882, *Entsch.* p. vi. No: 34, p. 138, s. 5.

† Law as to Costs of June 18, 1878, s. 85.

‡ Evidence must be taken in the form required by the law of the country in which it is taken (*e.g.* as to oaths) (Decision of the R.G. of May 8, 1880, *Entsch.* C.S. vol. 2, p. 100).

authorities of which execute the judgments of German courts, without the necessity for a new action, the Court of First Instance should at the request of the judgment creditor request the competent authority in the foreign state to execute the judgment in question.

If execution can be effected by the Consul of the Empire, *i.e.* where there are consular courts, the request should be addressed to him [s. 700].

An attachment may take place if it is to be feared that without Attachment.  
it the execution of a judgment would be made impossible or rendered very difficult. This state of things is presumed to exist when a judgment would have to be executed abroad. The question whether the defendant is a German or foreign subject whether he is domiciled in Germany or abroad is immaterial [s. 797].

Foreign creditors according to the view of the German bank- Bankruptcy.  
ruptcy law are in the same position as German creditors. The Foreign creditors in  
Chancellor of the Empire may however with the assent of the German adjudication.  
Federal Council except the subjects of states who do not practise reciprocity in this respect.\*

If a person having property in Germany is declared a bankrupt abroad execution may be granted against such property notwithstanding the foreign bankruptcy. The Chancellor of the Empire with the assent of the Federal Council may allow exceptions from this rule in favour of particular states.†

A debtor not generally subject to the jurisdiction of a German court may be liable to proceedings in bankruptcy with respect to property situate in Germany if he have an establishment in Germany from which business may be transacted immediately. If bankruptcy proceedings have been taken against him abroad, proceedings in Germany may be taken without any further proof of his insolvency [s. 208].

## VI. TREATIES.

There is a treaty between the Grand-duchy of Baden and France, 16 April, 1846, for the mutual enforcement of the judgments of the two countries. This treaty was extended to Alsace-Lorraine by Act 18 of the additional treaty annexed to the German-French Treaty of Peace, 11 Dec., 1871. Treaties.

There is also a treaty between the Grand-duchy of Baden and the Swiss Canton Aargau, dated 23 August, 28 September, 1867.

\* Bankruptcy Code, s. 4.

† Bankruptcy Code, § 207.



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There is further a treaty between Austria and the Grand-duchy of Baden relating to the mutual enforcement of judgments in civil matters, the provisions of which have been published in the Baden Official Gazette under date 26 June, 1856.\*

DECISION OF THE REICHSGERICHT IN AN ACTION ON AN  
ENGLISH JUDGMENT, REFERRED TO ON PAGE 467.

*Reported Entscheidungen des Reichsgericht in Civilsachen.* Vol: vii. p. 406.†

The defendant is a shipowner residing in the Grand-duchy of Oldenburg. One of his vessels was shipwrecked in the Thames and in consequence vessel and cargo were sold in London for account of those concerned. The total proceeds were paid to the defendant's agents in London, W. & G. The plaintiffs I. & Co. in London had a claim of £119 14s. 1d. payable out of the proceeds, as part-owners of the cargo. Not being able to recover this amount from W. & G., who had in the meantime become insolvent, they sued the defendant in a London court. The defendant accepted service without disputing the jurisdiction of the court in question; the Court of First Instance found for the plaintiff and the defendant's appeal was dismissed. The judgment having become valid, the plaintiffs sued defendant in the provisional court at Oldenburg asking the court to declare the plaintiff's right to execution by issuing a writ of execution (C. C. P. § 660).

The defendant contested the plaintiff's claim on the basis of § 661, 2nd section Nos: 3 and 5, asserting that *the jurisdiction of the English courts* in the action in question was *not justified* according to German law and that reciprocity in England was not guaranteed. The provisional court issued the writ of execution as asked for by the plaintiff. The defendant's appeal was dismissed the Court of Second Instance deciding that the jurisdiction of the English courts required by § 661, section 2, No: 3, although not existing originally, was justified by a tacit understanding according to §§ 38, 39 C. C. P. and that reciprocity must be considered as guaranteed according to the *habitual practice of the English courts*. With regard to the latter point, the Court of Appeal rested its decision on the assumption, that a *guarantee* of reciprocity is not only found in treaties or statutes, but that it exists already, when, *as a matter of fact*, the judgments of German courts are executed in a foreign country, without further examination of the legality of such judgments. The court was further of opinion, that the only point to be decided in a particular case was, whether the execution of a German judgment *of the same kind* could be considered as guaranteed in the foreign state in question, and the court held that in the present case this question must be answered in the affirmative, because the points raised by the defendant against the judgment, of which execution was demanded, were according to his statement only the following :

\* The *Reichsgericht* has also held that reciprocity is guaranteed between the German Empire (generally) and Austria, even in the absence of treaties to that effect (Decision of Sept. 22, 1883, *Annalen & R.G.* vol: 8, p. 354) because the Austrian decrees of May 18, 1792, June 18, 1799, and Feb. 15, 1805, have generally prescribed the execution of foreign judgments in civil actions, in so far as the jurisdiction of the foreign judge does not admit of being disputed, and in so far as the foreign state in question executes Austrian judgments.

† The references to English text-books are omitted.

(1) that judgment had been obtained by an incorrect representation of the facts (2) that he had a counter-claim against plaintiff; points of *this kind*, however, could not have been raised in an English court, when the execution of a foreign judgment was in question.

The defendant appealed to the Reichsgericht and was successful, the plaintiff's claim being dismissed for the following

#### REASONS :

The recognition of the jurisdiction of the English courts as based on tacit understanding, cannot legally be objected to.

The defendant in his contention before us has confined himself to maintaining that the supposition of the Court of Appeal *that reciprocity is guaranteed in England* is erroneous in point of law. He has supported his contention by asserting (1) that the habitual practice of foreign courts *as a matter of fact* could not be considered as a *guarantee* of reciprocity (2) that according to the rules adopted by the practice of English courts a *further examination of the legality* of foreign judgments (of which execution is demanded) is allowed, contrary to the requirements of reciprocity.

The rules which English courts apply with regard to the execution of foreign judgments form according to the English legal conception, a part of the Common Law that is of the *lex non scripta* which only exists in the mind of the judges (*in gremio magistratum*) and which rule on the principle that legal practice (*jurisprudenz*) is binding as law in the same manner as law created by statute.

If the security for reciprocity required by the expression 'being guaranteed' may be found, according to the intention of the Code of Civil Procedure (as appears from the minutes of the committee of justice p. 334 ss. 440 ss. and as other imperial statutes determine [German Criminal Code, ss. 102, 103, 187]) not only in international *treaties* but also in the existence of corresponding *laws* enacted by the foreign state, the expression 'law' must include here, as well as in s. 12 of the Act introducing the Code of Civil Procedure, *every legal norm* (*Rechtsnorm*) and it can therefore make no difference whether the laws in question belong to the *written* or the *unwritten* law of the foreign state. As a matter of course, however, there can be no question of a *guarantee* by law, unless the *existence* of the laws in question be beyond doubt. The guarantee of reciprocity might therefore be affirmed with regard to England, if it could be safely assumed that a principle of law *exhausting* the requirements of reciprocity exists and is *universally* recognised by the English courts.

The law by which reciprocity is 'guaranteed' may be part of the 'unwritten law' of the foreign country.

According to § 661 sec. 1 of the C. C. P. the writ of execution is to be issued without an *examination of the legality of the decision*. The German courts, therefore, are bound to the *unqualified recognition* of the *legal validity* (*Rechtskraft*) of the judgments of foreign courts (which are to be enforced by them) after they have become valid by the law of the state in which they have been obtained. It is therefore an essential requirement of reciprocity, that the law of the foreign state should recognise in an equal degree the *legal validity* of the judgments of German courts (which are to be enforced by its courts) and that an examination of their legality, both as regards the material justice of the decision as to matters of fact or law, and with respect to matters of procedure, should neither be required as a condition of their execution, by the court *ex officio*, nor be allowed by the admission of *pleas which might lead to it*. The question remains, whether beyond this there is a further *general* requirement of reciprocity according to which it is necessary that the law of the foreign state imposes *no* conditions on the admissibility of the execution of foreign

By German law foreign judgments are executed without any further examination as to their legality; the same must be done in a foreign State to satisfy the requirement of reciprocity.

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judgments beyond those contained in § 661 [sec. 2, § 2, 3, 4]; (these requirements would be that the act to be enforced is enforceable according to the law of the country, that the courts of the foreign state are competent according to the law of the country, that in the case of a judgment against a contumacious German service has been effected in the prescribed manner) or whether, as the Court of Appeal has decided the question of reciprocity is only to be decided with regard to the converse case and that uniformity may be said to exist, when there is a guarantee that a judgment of *the same kind* would be enforced in the foreign country, but this question need not be decided with reference to the case before us.

It is not sufficient that the objections which are raised against the execution of a particular judgment cannot be raised in the foreign State.

The Court of Appeal has however based its decision on the further assumption, that with regard to the question whether the execution of a German judgment of the same kind is guaranteed in England, it is sufficient to ascertain whether the English law admits objections of the same kind *as the present defendant thinks he can raise* against the English judgment (according to his statement) which objections as a matter of fact, are directed only against the material justice of the decision. This assumption is erroneous in law because, after what has been said, the point to be established, with reference to the question of reciprocity, (even if it be confined to judgments *of the same kind*), is, whether according to the English law it *is in any case* possible to impugn the legality of the decision and because reciprocity may also be considered endangered by the admissibility of pleas *of a different kind*. That this assumption is bad in law may also be concluded from the fact that according to § 661 sec. 1, the defendant's objection against the legality of the judgment, which is to be enforced, cannot be considered in Germany and that therefore he cannot be bound to declare himself as to the objections which he might be able to raise, if any objections were admissible, in consequence of which the German judge—as a mere matter of procedure—is already disabled from being guided by the position of the foreign law with regard to these particular objections.

The judgment in question must therefore be annulled and with regard to the matter itself the decision must be altered as to the question of reciprocity. [Then follow some arguments showing that the statements of the Court of Appeal as to the position of English law are too incomplete and partly also not clear enough to serve as a basis for an amended decision, and a paragraph giving the reason why the *Reichsgericht* enters into a statement of the English law, the decision of the Court of Appeal on a point of foreign law being generally final.]

The only *official document* referring to the matter is a letter addressed by H.B.M.'s ambassador to the German Foreign Office dated September 24, 1880. The ambassador states: that he is instructed to declare that English courts are legally authorised to execute the judgments of foreign courts 'unless the "defendant can impeach them as being *contrary to natural justice* or on the "ground of the judgment having been *irregularly obtained*."

This matter is fully discussed especially in its modern development, and the decisions on the points involved are given in the books already quoted.

It is on the statements of their authors that the following remarks are based.

It has been established in English law for a considerable time that a defendant condemned by the valid judgment of a foreign court, can be sued in an English court without its being necessary to enter into the merits of the case. Formerly however judgments *in personam* were only considered *prima-facie* evidence (judgments *in rem* received a more favourable treatment), that is they established a presumption, conclusive in itself but liable to be rebutted

Views as to foreign judgments held in England.

(a) In former times.

by counter-evidence, in favour of the existence of the *original* debt ; the counter-evidence—admissible in the form of normal pleas which had to be supported by defendant—could therefore be directed to disprove the existence of the debt or to repudiate the binding character of the judgment, by pointing out illegalities as to matters of procedure. It needs no argument to show that *this* treatment of the matter does not constitute a recognition of the *legal validity* of foreign judgments and that a guarantee of reciprocity from the point of view of the German Code of Civil Procedure cannot be found in it.

Within the last twenty years however an opinion has gained ground in English legal opinion that a *legally* obtained valid judgment of a foreign court, whether *in rem* or *in personam* must also be considered in England as a conclusive decision on the merits of the case (the so-called *merita causa*) and that when an action is brought into an English court to enforce a foreign judgment *in personam*, the cause of action is not the original obligation, but the obligation based on the judgment. (b) In recent times.

But though this modern doctrine, as we must suppose from the representation of the authors quoted above and from the decisions they refer to, has become established in the inferior courts, it has, according to one of them, not as yet been before the highest courts, and as long as the confirmation of the highest courts is wanting to it, we must abstain from considering it so firmly established, that its general applicability and permanence may be viewed as *guaranteed*. Recent views not confirmed by higher courts.

It must further be considered that even this modern doctrine has retained the view that the *legality of the procedure* which is a condition of the recognition of a foreign judgment is proved *prima facie* by the judgment but can be rebutted by counter-evidence. This view is in contradiction to the principle of § 661, sec. 1. It must however be borne in mind, when the principle of the Code of Civil Procedure is applied (namely, that a guarantee of reciprocity can also be found in the existence of corresponding laws in the foreign states) that a complete harmony of the laws of *different countries* cannot be expected, and we shall be justified, when comparing foreign laws, in looking less to their theoretical and formal construction, than to their practical intention. Starting from this point of view we must acknowledge that modern English decisions have in some directions abolished the pleas which were formerly admissible against foreign judgments and in other directions have curtailed them to a great extent, but several pleas have remained, which *essentially* prejudice reciprocity in so far as the principle of § 661, s. 1, is concerned, their admissibility being in some cases recognised up to the present time whilst in other cases it is desired by many authorities, but considered uncertain and subject to controversy by others. Even recent views allow an examination as to legality of procedure.

(a) With reference to this point we must, certainly, observe that the plea of violation of *natural justice* has in our days, no material and altogether no independent significance, the expression being only used for certain definite pleas which are otherwise admissible. Pleas against foreign judgments admissible in England.

(b) It is allowed to plead that the foreign court had no jurisdiction and that service had not been duly effected or that the defendant had not sufficient time to prepare his defence, but these pleas may as a rule not go beyond the requirements of § 661, s. 2. We must however emphasize the fact, which is of particular importance with respect to the question of jurisdiction in the case before us, that in English practice there are still differences of opinion about the question, whether and under what conditions a foreign court which originally had no jurisdiction, becomes competent by the voluntary submission of the defendant. (a) Violation of natural justice. (b) Want of jurisdiction.

(c) A plea alleging that the judgment is based on an *error of the judge* as to face of judgment. (c) Error apparent on face of judgment.



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*the facts*, is, certainly, no longer admissible in so general a form, but the admissibility of such a plea is still an open question in those cases, where error is *apparent on the face of the judgment*. Though such a plea, with this limitation, has no appreciable practical value in the case of an English judgment, as to which the question of fact is settled by the verdict of a jury, it cannot be denied that in the case of German judgments (which must contain a detailed exposition of the grounds of the decision including questions of fact) it can assume considerable importance, where the facts are complicated and doubtful, and that in such a case the admission of the plea leaves a wide opening for judicial discretion.

(d) Error in application of English law.

(d) A plea to the effect, that the foreign judge has been mistaken as to a question of law is no longer admissible where his own law or the law of other foreign countries is concerned; the admissibility of the plea in the case of an alleged error in the application of English law is however still open to controversy.

(e) Violation of comity of nations.

(e) It is further allowed to plead that maxims of international law have been violated (this is also called a violation of the comity of nations) especially when English law, contrary to the rules of international law, has not been applied.

(f) Judgment obtained by fraud.

(f) It is allowed to plead that judgment has been obtained by the plaintiff's or the judge's fraud. This principle is carried so far, that the omission to apply English law in cases where its application would have been *obviously* required, according to the opinion of the English judge, is considered a *wilful* refusal and therefore a fraud committed by the judge.

This wide interpretation being given to the term 'fraud,' the fiction of a plea alleging that the plaintiff has obtained the judgment by fraud may lead to decisions which are virtually a re-examination of the material grounds of the decision, of which execution is demanded.

(g) The limitation of actions part of the *lex fori*.

The decisions of foreign courts as to questions of the limitation of actions cannot be recognised by English courts.

This principle rests on the opinion which prevails in England, that the limitation of actions is simply a matter of procedure, which does not affect the continuation of the obligation and does not belong to the merits of the case. It is however in contradiction with the German view according to which the limitation of actions is part of the substantive law and equivalent to the prescription (*viz.* the extinction) *of the obligation*; this opinion therefore affects the recognition of the validity of the judgments of German courts on this question.

It appears from all these facts, that even in the present state of English legal practice it is possible to contest the *legality* of the judgments of German courts, of which execution is demanded in an English court, that this can be done by pleas, the admissibility of which is partly undisputed, partly dependent on the settlement of controversies which are still in existence, that especially the competence of a German court (supposing it had arrived at a decision under the same circumstances as the English court in the case before us) could not be considered *established beyond doubt* in England, and that further (which fact has a generally binding significance) the pleas in question include some, which according to their *legal* intention could be urged against *any* foreign judgment (*viz.* those alleging apparent error and fraud) and the success of which can in a good many cases only depend on an extensive measure of judicial discretion. In *such* a state of the law the *guarantee of reciprocity* required by § 661 cannot be found.



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[N.-J. SARIPOLOS.  
J. D. I. P. 1880, p. 173.]

## GREECE.

[including the IONIAN ISLANDS.]

Constitution and jurisdiction of the courts.

The Justice of the Peace (*cirēnodikēs*) has civil and commercial jurisdiction up to 300 drachmas (£12).

The Tribunals (*dikasterion*), composed of three judges, hear final appeals from the Justices of the Peace and have an original jurisdiction in all civil and commercial matters beyond 300 drachmas.

There are Courts of Commerce in two districts having a purely commercial jurisdiction.

The Court of Appeal (*epheteion*), composed of five judges, hears appeals from the Tribunals in civil matters beyond 500 drachmas, and in commercial matters and from the Courts of Commerce beyond 800 drachmas.

The Court of Cassation or Areopagus (*areiōs pagos*), composed of seven judges, is the supreme tribunal and hears appeals from all the courts.

*Code of Civil Procedure.*

s. 858, the same as Code Napoléon, s. 2123. [p. 449].

s. 859. The *exequatur* is granted

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i. by the President of the tribunal of first instance of the place where execution is to be issued according to the formula in sections 119 and 857, and without other examination of the merits of the judgment or public document, if all the parties to the cause are foreigners :

Where both parties  
foreigners.

ii. by the whole tribunal of first instance, and only after examination into the merits of the case if one of the parties is a native.

Where one party a native.

In this latter case the dispositions which have obtained the *exequatur*, as well as those to which it has been refused, must be signed by all the judges and the clerk.

s. 860. In this latter case [s. 859, ii.] the tribunal can only refuse execution when the judgment is found to be in opposition to the facts proved, or when the judgment or other public document is contrary to the prohibitive laws of the State.

s. 861. When in this case the tribunal has refused the *exequatur*,

i. the foreign judgment becomes of no effect, and the action must be fought out again before the tribunals of this state.

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- ii. the public documents executed abroad when they have been signed by the parties are to be considered in the nature of private agreements drawn up between the parties, agreeably to the Greek law upon the subject.

An appeal is allowed within 10 days.

*Loi d'hypothèque. August 11, 1836.*

Hypothec resulting from judgment.

The judgment, when the *exequatur* is given upon it, assumes the force of *res judicata*; and there arises a general hypothec upon immoveables in the country 'présents et à venir.' [ss: 14. 16. 22. 67.]

## IONIAN ISLANDS.

The Civil Code is based upon Italian law which prevails in the Island.

*Civil Code.*

SERVICE ON ABSENT  
DEFENDANTS.

in what cases.

s. 8. A foreigner though not residing in the Ionian Islands may be cited before the Ionian tribunals for obligations contracted by him with an Ionian in the Ionian States.

s. 9. A foreigner residing in the Islands may be cited before the Ionian tribunals for obligations contracted by him with an Ionian in the Ionian States.

s. 10. A foreigner residing in the Islands may be cited before Ionian tribunals for obligations contracted by him in a foreign country provided the subject in dispute exist within the States.

Security for costs.

s. 11. In all matters except those of commerce, a foreigner when plaintiff shall be bound to give security for the payment of the expenses and damages resulting from the process, when he does not possess in the State real property of sufficient value to assure the payment.

[M. SANNA.  
CESAR NORSIA. R. D. I.  
1877, pp: 78, *et seq.*]

## ITALY.

[including the States of LOMBARDO-VENETIA, MODENA, PARMA, SARDINIA, TUSCANY, TWO SICILIES and the PONTIFICAL STATES, and the Islands SARDINIA and SICILY.]

Constitution and jurisdiction of the courts.

The *Conciliator* in every commune has jurisdiction up to 30 lire (about £1 5s.): the Pretor of the division (*mandamento*) hears appeals from the Conciliator, and has an original jurisdiction in civil and commercial matters up to 1500 lire.

The civil courts (*Tribunal Civil et correctionnel*) hear appeals from the Pretor in his original jurisdiction: and have an original

jurisdiction in all civil matters which would not come before him : Commercial cases are taken before them when there is no *Tribunal de Commerce* in the district : they then sit with two merchant assessors.

The Courts of Commerce also hear appeals from the Pretor in commercial matters, and have an original jurisdiction in such matters beyond 1500 lire.

There are twenty Courts of Appeal composed of five judges, which hear appeals from the Civil and Commercial Courts in their original jurisdiction.

There are five final Courts of Appeal (*Cour de Cassation*) composed of seven judges.

The *Cour de Cassation* at Rome alone rehears a case after quashing a decision.

### *Civil Code.*

#### s. 10. (*Preliminary Matters.*)

The competence of tribunals and the forms of procedure are regulated by the law of the place where the action is being carried on.

The manner of proceeding to the execution of deeds and judgments is regulated by the law of the place where execution is proceeded with.

#### s. 12. ( „ )

In no case shall the laws, acts and sentences of a foreign country, nor private dispositions and arrangements derogate from the prohibitive laws of the kingdom which concern the persons, goods and acts ; nor from the laws which in any way affect public order and good manners.

s. 1973. the same as Code Napoléon, s. 2123 [p. 449].

Under the provisions of the Franco-Sardinian Treaty, and apparently also generally under this section, the Italian courts have decided that the *inscription de l'hypothèque*, or registration of the judgment, may be done before the judgment has been rendered executory, subject to the right of obtaining the *exequatur* at a later date, when it becomes necessary to follow up the effect of the registration. (*Duport v. Chateauvillard*, J.D.I.P. 1879, p. 86.)

### *Code of Civil Procedure.*

s. 105. A foreigner not domiciled in the kingdom may be cited before the judicial authorities of the kingdom, although he is not found within it, in what cases.

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DEFENDANTS.

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- i. in actions concerning moveables or immoveables situate in the kingdom :
- ii. concerning obligations arising out of contracts entered into in the kingdom or to be executed there :
- iii. in all other instances in which it may be effected by reciprocity.

s. 106. Besides the cases mentioned in the preceding article, a foreigner may be summoned before the judicial authorities of the kingdom for engagements or obligations contracted by him in a foreign country,

- i. if he has a place of abode in the kingdom even should he not be there at the moment :
- ii. should he be in the kingdom, although he have no residence in it, provided that he be summoned *in propria personâ*.

s. 107. When a foreigner has not a fixed residence nor domicil in the kingdom and a locality has not been determined upon for the execution of the contract, the proceedings against the person or property are initiated before the judicial authority of the place where the plaintiff resides.

Mode of service.  
Persons resident or domiciled.

s. 141. Persons whose domicil, residence or dwelling-place is unknown are summoned by posting a copy of the citation on the outside door of the building which is used by the judicial authority before whom the demand is made ; by the insertion of a summary of the citation in the public journal used for judicial announcements ; and by the delivery of a copy of the citation in the office of the *procureur (il ministero pubblico)* attached to the civil tribunal within the jurisdiction of which the said judicial authority is located.

Persons not resident nor domiciled.

s. 142. Persons not having a residence, domicil or dwelling-place within the kingdom are summoned in the manner prescribed by the preceding section. The *procureur* transmits the copy of the citation to the minister for foreign affairs.

If there be within the state [in which such persons are domiciled or residing] a *procureur général*, they may be summoned through him.

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JUDGMENTS.

s. 559. The judgments of foreign tribunals and the decisions obtained out of the kingdom are not executory in the kingdom unless due authorisation has been obtained in accordance with Title xii. Book iii. of this Code.

*Title XII. Book III.***Chapter XIII.**

## OF THE FULFILMENT AND EXECUTION OF DECREES AND DOCUMENTS AUTHORISED BY FOREIGN AUTHORITIES.

s. 941. The power to carry into effect the judgments of foreign judicial authorities is granted by the Court of Appeal in whose circuit the same are to be executed, provided that the Court examines the decision to see,

Special proceeding to render foreign judgment executory.

- i. if the sentence has been given by a competent judicial authority.

Examination of the judgment.

With reference to the competence of the foreign court, the Italian court should see whether the subject matter of the judgment is within the exclusive jurisdiction of the Italian courts. (*Avril v. Donaudy*. J. 1881, p. 538.)

- ii. if sentence has been pronounced after the parties have been duly summoned.
- iii. if the parties have been legally represented or were legally absent.

These three points are to be decided according to the law of the country whence the judgment comes (*Mazetti v. Cisi*. J. 1881, p. 536). Thus in *Sottocasa v. Sottocasa-Nolli* (J. 1879, p. 82) a French judgment by default was refused execution, under ii, the provisions of the French Code of Civil Procedure, s. 69 (8) not having been complied with.

- iv. that the judgment does not contain provisions which are contrary to public order, or to the internal laws of the kingdom.

These four rules are to be strictly adhered to : the court must go into no questions tending to correct, explain or extend the judgment (*re Sant-Cassia*. J. 1879, p. 301).

With regard to questions of public order the Italian court should see whether the foreign judgment affects the national sovereignty or the laws of public safety and good manners ; whether it affects or hinders the due execution of the laws of the kingdom ; or if it disposes of things situate in the kingdom in a manner different to that established by those laws : in such cases execution should be refused (*Avril v. Donaudy*. J. 1881, p. 538).



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Judgments by default.

With reference to foreign judgments pronounced in the absence of proof and by default (*uniquement à titre de peine du défaut du défendeur*), the Court of Appeal at Genoa declared them to have no legal foundation and refused execution : But the judgment being in these terms, ‘ the defendant not having appeared, it must ‘ be presumed that he had nothing to say to the plaintiff’s case ; ‘ and moreover, the plaintiff’s case having been gone into, it was ‘ considered just and entitled to support ; ’ the Cour de Cassation at Turin reversed the decision, holding that although the theory was good, it was not applicable to this case, proof having been required and given. (*Demarre v. Bosso*. J. 1879, p. 292.)

Citation of parties interested.

s. 942. The decree of deliberation (*il giudizio di deliberazione*) is obtained by a summary citation of the parties interested after the *procureur* (*il ministero pubblico*) has been consulted.

The party asking for the decree must present the judgment in an authenticated form ; that is, according to the law of the country whence it comes. (*Freyberg v. Benasati*. J. 1879, p. 209.)

Solicitor appointed to act for party when necessary.

If the execution of a sentence or judgment be demanded through diplomatic agency (*nelle vie diplomatiche*), or if the party interested has not named a solicitor (*procuratore*) to move for the decree of deliberation, the Court of Appeal at the request of the *procureur* can appoint a solicitor to act for the party.

Execution of orders of sequestration.

s. 943. As to the execution in the kingdom of orders of sequestration granted by foreign judicial authorities, the provisions of the two preceding articles are followed so far as they may be applicable.

Authenticated documents.

s. 944. The power to carry into effect documents authenticated in a foreign country is conferred by the Civil Court of the place where the document is to be carried into effect, provided that the judgment be in accordance with the rules set out in sections 941 and 942 so far as they may be applicable.

s. 945. A judgment given or any measure provided by foreign judicial authorities respecting examination of witnesses, valuations, affidavits, interrogatories or any other legal acts or documents to be performed or executed in the kingdom, is made executory simply by a decree of the Court of Appeal of the place where such acts or documents are to be executed.

If execution is asked for direct by the parties interested, then the petition is presented to the court, with an authentic copy

annexed to it of the sentence or of the measures by which the acts aforesaid were ordered.

If execution is demanded by the foreign judicial authority then the request must be forwarded through the diplomatic channels, and in this case there is no need for annexing a copy of the judgment.

The court deliberates in a private sitting, after hearing the public prosecutor, whether execution shall be allowed of the acts or documents as demanded. Proceedings of the court.

Its decision is handed to the judicial authority or to the functionary representing it in order that it may be carried into effect.

s. 946. When the request is made through diplomatic channels and the party interested has not appointed any person to act for him in obtaining the execution of the acts or documents mentioned in the preceding section, then the instructions and measures, summons, writs and notices necessary to carry into effect such acts, are officially ordered by the court that has undertaken the proceedings.

If such acts, owing to any special circumstances, require the attendance of the party interested, then the court aforesaid can appoint a person to represent the party.

If the presence of the parties interested is required or permitted at the drawing up of the act or document and the order which names the day when the act or document is to be executed, they are to be informed of it by simple note of hand delivered by the usher to such of the parties whose residence is known. Notice of party if absent.

A copy of the decree is forwarded through diplomatic channels to the foreign authority in order that the other parties may be made acquainted with the proceedings.

s. 947. When it is a question of a summons to appear before foreign authorities or of a simple notification of acts coming from abroad, permission to serve it is granted by the *procureur* attached to the court or tribunal in whose circuit or jurisdiction the summons or notice is to be served. Leave to serve summons.

If the service of the summons or notice have been demanded through diplomatic channels, then it is to be given by the *procureur* direct into the hands of the usher or sheriff's officer.

s. 948. The execution in the kingdom of the acts mentioned in the three preceding articles does not do away with the necessity of obtaining the decree of deliberation when it is a question of the execution of the final judgment.

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s. 949. The executory power, as set forth in sections 941-947, when granted by a civil tribunal, Court of Appeal or *procureur*, is valid in order to obtain execution in any other circuit or jurisdiction.

s. 950. The resolutions and dispositions contained in the present article are subordinate to international treaties and special laws.

From the above articles it will be seen that a special procedure for enforcing foreign judgments has been provided in Italy, called '*giudizio di delibazione*' (*instance en exequatur*, or decree of deliberation) as distinguished from the '*giudizio di merito*' (*instance sur le fond du droit*). By means of this procedure the foreign judgment is rendered executory and can be carried into execution when clothed with the '*formule d'exécutivité*'.

The principles adopted by the Italian courts as to the examination of the foreign judgment are as follows :

It will be examined to see if it bear the character of a veritable decision, and whether it has been given in a contentious suit : that it is executory in its own country, and that it is in accordance with the law of that country.

Where jurisdiction has been assumed by the foreign tribunal, the defendant being out of the jurisdiction, the proceedings will be strictly examined to ascertain if sufficient time was allowed for appearance, and whether, the defendant having been regularly cited, the judgment by default was regularly pronounced : also as to the cognizance of the Judges.

Apparent error.

If there be an apparent error, for example if a Tribunal de Commerce has decided matters solely within the cognisance of the civil tribunals ; or, if the defendant, having been served out of the jurisdiction, appeared and pleaded to the jurisdiction of the court and the plea was rejected, the judgment may be examined : lastly, fresh documents may be examined, especially if they tend to show that the relations between the parties have altered since the judgment was pronounced. An authorised copy of the foreign judgment is sufficient. The documents on which it is founded need not be produced, but the judge may order them to be produced to clear up any questions raised (*Palandri v. Lauthier*. J. 1883, p. 87). Pendency of appeal in the foreign country does not operate as a stay of proceedings on the judgment in Italy. Nor does the plea of *lis pendens* appear to be recognised by the Italian courts : the principle upon which they act being that if

Fresh documentary evidence admitted.

the Italian tribunal is competent and is duly seized of the action, a judgment of an equally competent foreign tribunal cannot be made executory or be considered so long as the Italian tribunals have not decided the questions raised within the limits of their jurisdiction (*Morand v. Debenedetti*. J. 1879, p. 212) but this principle was somewhat modified in *Huet v. Bouturlinn* (J. 1881, p. 547), where it was held that, when the same question has been decided by a foreign court, there is good ground not to declare absolutely that the foreign judgment shall not be enforced, but that execution on it shall be suspended till the Italian decision is pronounced.

Section 14 of the Code Napoléon [p. 446] and similar enactments, including doubtless the English Order XI, rule 1, are not

O. xi, r. i.

recognised, and judgments proceeding on them are held to be of no effect in Italy. The provisions of the French code on the subject of assumed jurisdiction over non-resident aliens have been most severely commented upon. The Italian courts have again and again refused to enforce judgments proceeding upon it (e.g. *Ardizoni v. Ridri*. J. 1881, p. 542): in one case where the defendant had appeared before the French court and pleaded its incompetency, and the plea having been rejected, he was allowed to plead the same defence in Italy (*re Glisenti*. J. 1879, p. 211): and more than once they have taken the extraordinary step of acting upon the provision themselves when an Italian has desired under similar circumstances to summon a Frenchman before the Italian courts to enforce the execution of engagements contracted by him in a foreign country, a procedure not allowed by the Italian code. In *Debenedetti v. Morand* (J. 1879, p. 72) the court pronounced this remarkable judgment:—‘This exorbitant position of the French law necessitates the ordinary rules of competence being considered as at an end. It results if not *jure reciprotatis*, at least certainly *jure retorsionis* that the Italian is entitled to apply to the Frenchman the same law which would be applied to him, an Italian, in France. This is the principle of the common law; *quod quisque juris in alterum statuerit, et ipse eodem jure utatur*.’

Decisions on the French Civil Code, s. 14.

This principle of retaliation was carried still further in *Levi v. Pütre* (J. 1879, p. 295): the court, considering that the French courts examine the merits of an Italian judgment, held that it would examine the merits of a French judgment.

The Italian courts have, however, endeavoured to be logical and have applied the French rules of renunciation [see page 448]

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to an Italian who by electing a domicile in France for the execution of a contract concluded in France with a Frenchman, has created a jurisdiction in that country; he must therefore bring actions against a Frenchman there (*Cie: de gaz de Marseilles v. Cie: Bingen*. J. 1881, p. 438). The explanatory *motif* of the court on the subject of the *lex talionis* is interesting as it defines the position taken up by the Italian courts.

‘Le droit de retorsion ou de représailles n’est pas et ne peut pas être un titre ou un principe rationnel de droit ou de compétence. Il n’a été admis que pour protéger le citoyen d’un état contre le traitement injuste auquel il pourrait être exposé dans un autre état; mais il est désormais reconnu qu’il est peu propre à atteindre ce but de protection. En effet il rend plus âpres, loin de les adoucir, les sentiments de défiance, de jalousie ou d’hostilité dans lesquels malheureusement les peuples ont été élevés. C’est pourquoi la doctrine et la jurisprudence s’accordent aujourd’hui à le restreindre dans les limites de la nécessité la plus rigoureuse.’

When the special procedure to be used.  
Judgment as to  
immoveables in Italy.

Status.

A foreign judgment relating to immoveables in Italy will be considered under this special procedure of deliberation; and if the court thinks fit it will be rendered executory: a judgment relating to the status of a stranger residing in the kingdom takes effect of itself and without the intervention of the procedure (*De Maillé v. Duchesse de Plaisance*. J. 1879, p. 74); but if any of the parties think it necessary and make the formal request, it must be allowed without any enquiry as to the grounds for the application: (*id.*) all the general requisites for the grant must however be present; and similarly, if the judgment be produced only to give its enacting part the force of *res judicata*, it is not necessary.

Bankruptcy.

In Bankruptcy, if the sentence be used as proof of the fact or to serve as a defence in an action by one creditor against the interests of the mass of the creditors the procedure is unnecessary; but when the decree is used to found execution upon it, it is required: it is required also in an action by the trustees on a contract by the bankrupt to render their appointment executory.

Where a foreign company is bankrupt the procedure is not necessary in order to affect the branch establishments in Italy.

Effect of foreign  
bankruptcy.

In *Hoffman v. Mack* (J. 1879, p. 77) the plaintiff who had an agency in Milan had been made bankrupt in London: the defendant, a creditor, obtained leave to issue a *saisie-conservatoire* on the plaintiff's effects in the hands of his agent. The English trustee demanded the reversal of the order, or at least a suspension



till the adjudication had been made executory. The court of Milan cancelled the order and sent the defendant to prove in the English proceedings.

Where parties have contracted abroad and have chosen a country for the execution of the contract the jurisdiction of the courts of that country will be admitted.

If execution is asked of authentic acts executed in a foreign country, the proper court to apply to for process is the Civil Tribunal of the place where execution is sought. But if execution is asked of a judgment, the Court of Appeal of the district must be applied to. The Court of Appeal however has jurisdiction concerning the granting of executory force only: disputes arising on the actual execution must be settled by the ordinary courts.

In order to justify the plaintiff's application, he should have in the jurisdiction of the court applied to, either property moveable or immoveable, or domicile or residence.

The judgment must be properly authenticated (*légalisé par voie diplomatique*) and may be produced by the party interested, or by '*commission rogatoire*' from the competent foreign authority: in this case the Court of Appeal assigns counsel if one is not already instructed by the party to present the petition.

PROOF OF FOREIGN  
JUDGMENTS.  
—

The writ is to be produced to establish the regularity of the judgment, and all other papers the court may require.

If the judgment is not in absolute terms, but is subject to the performance of some condition, for example the taking of an oath, it is not sufficient merely to present the judgment properly attested, there must be a further attestation, in the same form, that the condition imposed has been fulfilled (*Freyberg v. Benasatti*. J. 1879, p. 209).

An appeal is allowed, the foreign judgment itself being produced.

*Law 14 December, 1865, ss: 119-121.*

An Italian judgment is authenticated in the following manner: it is to be signed by the Judge of First Instance; this signature is to be verified by the Judge of the Court of Appeal; this by the Minister of Justice, and this in its turn by the Minister of Foreign Affairs. Authentication of Italian judgments.

A convention exists between France and Sardinia, 24 March TREATIES.

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1760, continued with Italy 11 September, 1860, as to the 'voie diplomatique' requisite for the mutual authentication of the judgments of the two countries [set out on page 456];

There is also a Treaty between Spain and Sardinia, 30 June, 1851, which has been declared by the Italian Court of Appeal to relate to Italy [set out on page 502];

and a convention between Italy and Brazil, 27 May, 1880, for the reciprocal execution of judgments in questions relating to successions and wills.

Italian forms.

[From Borsari's edition of the Code.]

**Forms.****No: 1.**

The power to carry into effect the judgment pronounced by a foreign judicial authority is granted by the Courts of Appeal. [s. 941.]

**CDXXI.**

Notice of application to the Court to authorise the execution of a foreign judgment.

Before the Court of Appeal of \_\_\_\_\_, and at the request of Mr R \_\_\_\_\_, resident at \_\_\_\_\_, who elects domicile in the kingdom in this city with Mr \_\_\_\_\_, represented by the advocate, Mr \_\_\_\_\_ : Mr Amilcare B \_\_\_\_\_, resident at \_\_\_\_\_, and Mr Dominic L \_\_\_\_\_, resident at \_\_\_\_\_, are summoned to appear at the sitting of the court, which will be held on the \_\_\_\_\_ day of \_\_\_\_\_, which day has been appointed by His Excellency the President for the purpose of granting authority to issue execution on the immoveable property of the defendants, and also on any other property belonging to them, in accordance with the laws of this country.

**CDXXII.**

Form in which the court authorises the execution.

In the name \_\_\_\_\_  
The Court of Appeal of \_\_\_\_\_, in the suit for decree of deliberation between \_\_\_\_\_  
has pronounced the following judgment,  
The plaintiff claims \_\_\_\_\_  
The defendants reply \_\_\_\_\_  
The *procureur* has appeared and has summed up, that whereas \_\_\_\_\_

The Court declares that the judgment pronounced by the Tribunal de Commerce of Marseilles on the \_\_\_\_\_ day of \_\_\_\_\_ be carried into effect.

**No: 2.**

The execution of the judgment may be asked through diplomatic agency. [s. 942.]

An English subject, who has obtained a judgment against an Italian, remits

through the English Ambassador to the Italian Minister of Foreign Affairs a petition to that effect, which document is forwarded by the said Minister to the Minister of Justice, who in his turn sends it to the '*Procuratore Générale*' of the court in whose circuit the execution of judgment has to take place.

The judgment then takes another form.

## CDXXIII.

The summing up of the *procureur*.

To the Honourable Court of Appeal of

I have the honour to communicate to this court that His Excellency the Minister of Justice by his letter of the                      day of                      has remitted to this office a petition that had been forwarded by the English Government, in which it is asked of the competent judicial authorities of this country to grant the execution of a judgment pronounced by the Tribunal of Commerce at Manchester on                      day of                      , in the suit of O. O., British subject, against B. B., Italian subject, resident at Genoa: the purport of the said judgment being that the defendant, B. B., was ordered to pay 10,000 lire.

By our laws Mr O. O., British subject, must be represented by an attorney resident in the place, and this in accordance with section 942 of the existing Code of Procedure, therefore the *procureur* requests that this Honourable Court should name officially an attorney to represent the party aforesaid in order to obtain the decree of deliberation.

A. B.

(*Procuratore Générale*.)

## CDXXIV.

Order of the court appointing a representative for the foreign plaintiff.

The court of                      , Civil Section, having examined the statement made by the *procureur*; having heard the report made by the judge, Mr                      ; having deliberated in chambers, in accordance with section 942 of the Code, upon the terms of the petition, and for the purpose therein mentioned, nominates the advocate Mr Sigismond A, resident in this city, as representative of Mr O. O., British subject.

## No: 3.

Must a judgment requiring affidavits, interrogatories and proofs to be made, answered or obtained in this country go through the same formalities?

What interests us is not exactly the contents of the judgment, but its tendency, the way in which it is drawn up and the purport of it; could not all this be made an obstacle to the grant of execution?

It will be necessary in order to determine this to follow precisely the thread of the ideas above expressed; if the foreign judgment entails some order which requires consideration for the purpose of establishing any principle, or any formality that may arise therefrom—such as an examination of witnesses, a verification by experts, a material and effective verification—these being only consequences of the judgment, we shall then have a decision to which leave of execution cannot be granted till after the study and examination imposed by section 941 and after demonstration of its legality according to our laws.

To the isolated request to allow a proof to be taken in a suit in which judgment is not yet pronounced, a decree of the following tenour may answer the purpose:

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## CDXXV.

Italian forms.

Form in which the court authorises the examination of witnesses.

The court of \_\_\_\_\_, Civil Section, having examined the appeal presented by Mr Silvester K \_\_\_\_\_, Russian subject, who has elected domicile at the offices of P. C., his attorney resident in this city, for the purpose of \_\_\_\_\_; having heard the report of the judge, Mr \_\_\_\_\_; having read the authentic copy of judgment pronounced by the Civil Court of Geneva that before any other step be taken as to the merits of the case, the court orders the examination of the witnesses resident at R \_\_\_\_\_, situated in this province, to proceed; and having heard the *procureur*; has decreed in chambers and authorised the execution of the judgment \_\_\_\_\_; and for the purpose of carrying into effect the operations therein mentioned, delegates the *Procureur* of \_\_\_\_\_

## No: 4.

Fulfilment of agreements [s. 944.]

## CDXXVI.

Judgment giving power to carry into effect an agreement entered into abroad.

In the name of \_\_\_\_\_.

In the matter between Scipio M., resident at Catania, represented by the advocate B., resident in this city, and X., not having any domicile in the kingdom, but residing at Stockholm, an absentee.

The Tribunal of \_\_\_\_\_ has pronounced the following judgment.

The plaintiff claims \_\_\_\_\_;—having heard the *procureur*;—and finding that on \_\_\_\_\_ an agreement was entered into at Stockholm between the plaintiff, Italian subject, and Polinto X., Swedish subject, in accordance with a notarial deed executed by the notary, Mr. H., of that city, of which document a duly legalised copy has been produced: finding also that by the said agreement Polinto X. binds himself to repay to Scipio M. the sum of 20,000 lire which he received in loan with interest at the rate of 6 per cent: per annum, giving a mortgage on the immoveable property that he holds in the province of Cremona: finding also in examination of the document in its intrinsic value and substance with reference to section 941 of the Civil Code that no objection can be raised to its execution:

The court authorises the execution of the agreement entered into between \_\_\_\_\_ in all respects.

## MONACO.

The Civil Code is, except as to a very few points, the same as the Code Napoléon.

*Code of Civil Procedure.*

s. 232. Foreign judgments and documents executed in foreign countries shall not be executory in the principality or on goods situated within it or the profits thereof, except by virtue of a

[E. DE LOTH, J. D. I. P.,  
1877, p. 121.]

special ordinance of the Prince on the report furnished to him by the Advocate General.

The following is the procedure:—*L'avocat défenseur* of the Monaco bar who is retained to present the petition makes out a request to His Serene Highness setting out the facts succinctly. Procedure.

In support of the petition an engrossed copy of the 'title' to be made executory and all other necessary documents are presented. This copy and all the other papers should be attested by a minister, a plenipotentiary, a chargé d'affaires, or a consul of Monaco according to the country whence the judgment comes.

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They are then stamped and registered. The brief is then remitted to the Advocate General who examines it to see if all the papers are regular, and that the judgment contains nothing contrary to the laws and customs of Monaco or against good manners. He then prepares a report and form of order which he submits to the Prince. H.S.H. either rejects the demand or endorses the order making the judgment executory, and directing the deposit of the title in the clerk's office where the parties may obtain copies of the order: the judgment may then be executed as a Monagascan judgment. Where the judgment has proceeded by default, an affidavit must be produced stating that it has been given according to the forms and after the necessary delays prescribed by the foreign law: and also that there is no appeal nor opposition pending.

Judgments by default.

The whole decision rests with His Serene Highness the Prince of Monaco, who exercises this right 'avec la plus impartiale justice et la plus grande circonspection.'

## NETHERLANDS.

[Colonies:—South America—DUTCH GUIANA or SURINAM.

East Indies—JAVA and MADURA, PAPUA, West Coast of SUMATRA or NEW GUINEA, CELEBES, MOLUCCAS, West, South and East parts of BORNEO, BENKULEN, LAMPONGS, PALEMBANG, RIAN, BANCA, BILLITON, MENADO, TIMOR and SUMBA, BALI and LOMBOK.

West Indies—CURACOA, ARUBA, SAINT MARTIN, BONAIRE, SAINT EUSTACHE, SABA.]

The Court of the Canton composed of a single judge has jurisdiction in civil and commercial matters up to 200 florins (£17): the Court of the Arrondissement, composed of three judges, has an original jurisdiction above 200 florins, and hears appeals from the Court of the Canton where the judgment exceeds 50 florins.

Constitution and jurisdiction of the courts.



## Chapter XIII.

There are five provincial courts, composed of five judges, which hear appeals from the Courts of the Arrondissement : they have also an original jurisdiction in all actions by consent of parties.

The High Court (*Hooge Raad*), composed of seven judges, is the final appeal court from the provincial courts and from the colonies. It has also an original jurisdiction, among other things, in matters of maritime prize : an appeal, when it sits as a court of first instance, lies to a full court of eleven judges.

In 1874 M. le baron Gericke de Hercoynen, Minister of Foreign Affairs in the Netherlands, started a project for an International Conference on the subject of foreign judgments ; a circular note was addressed to the Powers but nothing resulted from it. [There is a full account of this project in the *Journal de Droit International Privé*, 1874, p. 159.]

SERVICE ON ABSENT  
DEFENDANTS.

The method of service of writ on absent defendants is the same as in France.

### *Code of Civil Procedure.*

in what cases.

s. 127. A foreigner may, though not resident in the kingdom, be cited to appear before a judge in the Netherlands, in respect of obligations contracted with a subject of the kingdom either in the Netherlands or abroad.

The suit may be at the instance of either a subject or a foreigner. (*Anon.* J. 1875, p. 318.)

## PORTUGAL.

[Colonies :—CAPE VERDE ISLANDS, BISSAGOS ISLANDS. Saint THOMAS and PRINCES ISLANDS in the Gulf of Guinea: in Senegambia, BISSAO, &c., AJUNDA, ANGOLA, AMBRIZ, BENGUELA, MOSSAMEDRES, MOZAMBIQUE, GOA, DAMAUN, DIU, MACAO, part of TIMUR ISLAND, SALSETTE, BARDES and the INDIAN ARCHIPELAGO.]

Constitution and jurisdiction of the courts.

The functions of the Justice of the Peace (*juiz de paz*) are simply conciliatory.

The Judge of First Instance (*juiz ordinario*) has jurisdiction in civil matters up to 10,000 reis (£2 5s).

The Court of First Instance, composed of a single judge (*juiz de direito*), hears final appeals from the Judge of First Instance, and takes all other civil matters. It has also an original jurisdiction (unless there is a special Court of Commerce in the district) in all

commercial cases. The Court of Commerce consists of a judge and jury. There are five Courts of Appeal (*relação*), and two in the colonies, from the Courts of First Instance, in civil matters where the amount in dispute exceeds 50,000 reis; in commercial matters where the amount in dispute exceeds 100,000 reis: this amount varies according to the number on the jury, which in its turn varies according to the importance of the town. From the Commercial Courts of Lisbon and Oporto the amount is 200,000 reis.

The Supreme Tribunal, takes appeals on questions of law in all matters: on questions of fact in civil matters beyond 400,000 reis, in commercial matters by the plaintiff, if the amount is more than 1,000,000 reis; by the defendant if it exceeds 2,000,000 reis.

#### *Civil Code. 1867.*

s. 28. the same as Code Napoléon s. 14. [p. 449.]

s. 29. *id.*: s. 15. „

s. 31. Judgments pronounced by foreign tribunals on civil matters between foreigners and Portuguese subjects may be executed by order of the tribunals of this country, in conformity with the rules laid down in the Code of Civil Procedure.

Notwithstanding this section, foreign judgments in actions between foreigners may be revised by the Court of Appeal before being rendered executory. (*Punnet v. Alladinbhog Khoja*. J. 1875, p. 54.)

SERVICE ON ABSENT  
DEFENDANTS.

in what cases.

#### *Code of Civil Procedure. 1876.*

s. 180. The summons or writ to be served on a person residing outside the limits of the jurisdiction of the judge, or out of the district of the court that has issued them shall be served by special order.

Leave to serve out of  
jurisdiction.

s. 18. Corporate bodies shall be sued before the courts of the place where their head office is situate.

Foreign companies.

- i. The court of the place where the branches, agencies or affiliated establishments of any bank, society or company are situated, is competent to hear and determine suits brought against them, when it is a question of agreements effected or engagements undertaken by the said branches, agencies or affiliated establishments.
- ii. The provisions contained in the preceding section are equally applicable to branches, agencies or affiliated establishments of banks, societies, companies or any other association

## Chapter XIII.

whatsoever, which may have their residence in a foreign country with reference to deeds or agreements effected in Portugal.

s. 19. The action shall be brought in the district wherein the judicial act was executed or where the occurrence happened that has given rise to the suit.

## SERVICE ON ABSENT DEFENDANTS.

s. 20. A Portuguese subject or foreigner resident abroad can be sued before the Portuguese tribunal of the place where he may happen to be, should the suit be for an agreement entered into by him in the kingdom, or with a Portuguese in a foreign country.

s. 21. v. Judgments, including inventories for the division of property between married people, may be executed by the Court of First Instance, in which the motion for proceedings is made; except,

## Execution of Foreign Judgments.

vii. (b). the judgments of foreign tribunals which are to be executed by the court of the place where the defendant resides, or where the property is situate, according to section 1087: When the competence of the court by reason of the situation of property shall have been determined and the property is in more than one district, then the plaintiff can execute the judgment in any one of them;

(d). the judgments of the Court of Commerce which are to be enforced by the court of the place where the defendant resides; or should he be abroad, then by the court of the place where the proceedings to enforce the judgment may be instituted; and if these should be instituted in a foreign country then the matter is to be considered in the Lisbon Circuit.

## EFFECT OF FOREIGN JUDGMENTS.

s. 39. The Supreme Court of Judicature is competent,

vi. to examine the judgments pronounced by foreign tribunals and confirm them when the same are to be enforced in its circuit;

to revise judgments pronounced by foreign tribunals.

s. 1087. Judgments pronounced by foreign tribunals to which the third section of the Civil Code refers shall not be carried into effect in the kingdom unless they are first examined and confirmed by one of the Supreme Courts of the Judicature, in the presence of the parties interested and of the public prosecutor, except when from some other cause it be stipulated to the contrary.

i. Such a revision or confirmation is within the jurisdiction of the Supreme Court of Judicature of the district where the defendant

resides, or of that where the property is situate should the defendant have no domicile in the kingdom.

The use of the word 'examined' has been considered by the French courts to mean an examination of the merits, without reference to s. 1088. (*Smith v. Anderson*. J.D.I.P. 1882, p. 168.)

s. 1088. When the judgment has been presented and distributed (*e distribuida*) the person charged to report upon it shall summon the defendant to appear within eight days and make known his defences. The same time is given to the judgment creditor.

i. The following defences may be raised :—

Defences.

- (a) Any doubt whatsoever respecting the authenticity of the documents or the clearness of the judgment.
- (b) That the sentence or judgment was not duly pronounced.
- (c) That the sentence was pronounced by an incompetent tribunal.
- (d) That the parties either were not duly summoned, or were not legally absent.
- (e) That the judgment is contrary to the principles laid down in the Portuguese laws or is against the laws of public security and order.
- (f) If the judgment has been given against any Portuguese subject and is contrary to the principles laid down in the Portuguese Civil Code, the question must be determined by that Code.

ii. In the suit, evidence is not admitted as to the merits of the case.

s. 1089. After the defences have been presented within the time allowed, the suit shall be continued in the presence of the parties and of the public prosecutor according to the rules laid down in section 1049, and the case, together with the documents and schedules, shall go for final revision to the reporter (*relator*) and then to four judges in turn for their approval.

Procedure after defences lodged.

i. The judgment or decision shall be pronounced upon in private sitting, in the presence of at least three of the judges who examined the papers, who shall confirm, grant or refuse judgment by three votes at least.

s. 1090. The provisions contained in the preceding articles are equally applicable to judgments pronounced in cases where both the parties interested are foreigners or both are Portuguese subjects.

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s. 1091. The judgment having been confirmed, the decision on the case, or a copy of it when a revision intervenes, shall go to the court competent to carry it into execution.

Where there is a suit proceeding in Portugal for the same cause of action, a foreign judgment will not be considered a bar to the action unless it has been made executory according to the above rules. (*Veiga do Arneiro v. Barroil*, J. D. I. P. 1878, p. 448.)

From this case it would also appear that the plea of *lis alibi pendens* is not recognised by the Portuguese courts.

## OF PETITIONS.

s. 86. Petitions shall be presented in the King's name, signed and sealed by the judge in ordinary or by the judge who has reported on the case, and signed by the clerk.

s. 87. The judge or court to which the petition is addressed shall refuse the application, in either of the following cases:—

- i. If it is not competent to grant what is asked.
- ii. If what is asked is absolutely prohibited by the laws.

## OF ROGATORY LETTERS.

s. 88. The provisions of section 86 apply also to rogatory letters sent to the Portuguese courts.

s. 89. Rogatory letters emanating from foreign authorities if not received through diplomatic channels shall not be attended to without previously being submitted to the *procurateur*.

Procedure on rogatory  
commission.

- i. When placed in order and collected, the whole of the documents shall be left for examination for forty-eight hours in the hands of the *procurateur*, and afterwards the judge shall decide if they shall be executed.
  - ii. The *procurateur* has a right to set up any objection to the execution of the rogatory letters, and can have recourse by way of appeal against the orders issued.
  - iii. An appeal lodged by the *procurateur* against the order to carry out the rogatory request shall suspend the execution thereof.
  - iv. Any summons or writ to be issued if served by the clerk or usher shall be served as laid down in sections 179 & 180.
  - v. In the districts of Lisbon and Oporto the *procurateur* shall be represented by the General Trustees for Orphans when what is requested affects them.
- s. 213. Documents written in a foreign language shall only be



considered when accompanied by a translation duly legalised by the Consul of the place ; and, if the said documents are forwarded by foreign authorities, shall only be considered as valid if authenticated by the diplomatic agent or Portuguese Consul at the place, and the signature attached to them duly verified by the Minister of Foreign Affairs.

- i. Should there not be in the kingdom a Consul of the nation or country whence the document comes, then it shall be translated by an expert.

## ROUMANIA.

[including MOLDAVIA and WALLACHIA.]

[G. PETRONI, J. D. I. R.  
1879, p. 351.]

The Communal Courts, composed of a president and two assessors, have civil jurisdiction up to 50 *lei* (£2).

The Courts of the Arrondissements, composed of two judges, hear final appeals from the Communal Courts, and have an original civil jurisdiction up to 1500 *lei*.

The District Courts, composed of two judges, hear final appeals from the Courts of the Arrondissements, and have an original civil jurisdiction beyond 1500 *lei*.

The Courts of Commerce, composed of one judge and two assessors, have jurisdiction in all commercial matters.

There are four Courts of Appeal, composed of three judges, which hear appeals from the District Courts, and from the Courts of Commerce beyond 555 *lei*.

The Cour de Cassation, composed of seven judges, is the supreme tribunal and hears appeals from all the courts except those of the Communes.

### *Code of Civil Procedure.*

EFFECT OF FOREIGN  
JUDGMENTS.

s. 374. Foreign judgments can only be executed in Roumania in the same way and to the same extent as Roumanian judgments are executed in the foreign country, and after they have been declared executory by the competent Roumanian judges.

They are to be declared executory by the full court and not by the president alone : no action is allowed on the merits ; and there is no distinction recognised in favour of Roumanians.

The process is as follows :—

The party by himself or his proxy (compulsory application by attorney being unknown) sends his preliminary petition to the president or presiding judge : the judge notes on it the day of

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receiving it, and the day appointed for hearing : a fee is payable to the usher.

ss: 69. 94.

The tribunal competent to hear the action is that of the defendant's domicile, in the case of moveables : but in the case of immoveables that of the locality where they are situate.

In the principal districts the tribunals of first instance comprise several sections : the petition should go to the president of the first section, called 'premier president.'

The extrinsic conditions requisite for the enforcement of the judgment are :

conformity to the laws of public order.

reciprocity.

accuracy of the translation of the judgment.

[F. MARTENS, J. D. I. P.  
1878, p. 139.  
Centralblatt für das  
deutsche Reich. 1883,  
pp: 134-183.]

## RUSSIA.

[including in Europe—RUSSIA PROPER, POLAND and FINLAND, with the Islands SPITZBERGEN and NOVA ZEMLA; and in Asia—CAUCASIA, SIBERIA and CENTRAL ASIA.]

Constitution and jurisdiction of the courts.

The Court of the Canton, composed of a president and two assessors, exists only in the rural communes, it has jurisdiction up to 100 roubles (£16).

The jurisdiction of the Justice of the Peace (*mirovoy okrouge*) extends in civil matters up to 500 roubles, and in all cases by consent of parties ; an appeal in matters exceeding 30 roubles lies to the Assembly of Justices, composed of at least three judges ; in all matters by way of *cassation*.

The Courts of First Instance (*okrougenoié soud*), composed of three judges, have a civil jurisdiction beyond 500 roubles. In certain districts there are Courts of Commerce with jurisdiction over all commercial matters.

There are seven Courts of Appeal (*soudebniaia palata—cour judiciaire*) from the Courts of First Instance, composed of three judges.

A chamber of the Senate has been constituted a *Cour de Cassation* in all civil matters : a second chamber forms the Court of Appeal from the Courts of Commerce in matters over 1500 roubles (3000 roubles from the courts of Moscow and St. Petersburg).

The Courts of Finland are practically the same as those of Sweden.

There exist in Russia three distinct Civil Codes : first, the

Russian Code proper: secondly, the Polish Code: thirdly, the Code of the Baltic provinces and Finland. The second of these Codes is the only one however in which foreign judgments are mentioned.

In Finland, neither Russian nor foreign judgments are recognised. In the Baltic provinces foreign judgments are only executed when there are treaties on the subject with the foreign state, or when there exists complete reciprocity.

Foreign judgments, unless it be otherwise settled in political ordinances or treaties, do not carry judicial hypothec till they are clothed with an order of execution given by the ordinary competent tribunal.

The judgment of a foreign criminal court entails upon the criminal if he is a Russian subject the consequences according to Russian Law (case of Lieutenant Kitchenkow, J. D. I. P. 1874, p. 47).

*Code of Civil Procedure. 1864.*

EFFECT OF FOREIGN  
JUDGMENTS.  
Procedure.

s. 1273. Foreign decisions are to be rendered executory in Russia according to the rules laid down in international treaties concluded between the Imperial Government and the other powers. In the absence of treaties the Russian tribunals will follow the following dispositions.

- i. The preliminary authorisation of the Russian tribunal is necessary. (s. 1278.)
- ii. The tribunal competent to give executory force to a foreign judgment is the court of the arrondissement where execution is to take place. (s. 1275.)
- iii. The tribunal after having examined whether the cause has in reality been tried abroad by a competent tribunal, is to give its *exequatur* without any examination as to the merits. (s. 1276.)
- iv. The judgment may be examined if it is against public order or the laws of the Empire. (s. 1279.)  
A judgment contravening these laws or relating to the ownership of immoveables in Russia will not be enforced. (s. 1281.)
- v. The execution of the judgment will be according to Russian law. (s. 1250.)

In a recent case the *civil-kassations* Department of the Senate has decided that these sections only apply to countries with which

## Chapter XIII.

Russia has treaties; and that where there is no treaty, no recognition will be accorded to the judgment.

ss: 923 & 203 *et seq*: apply to the competence of the plaintiff applying to the court of the arrondissement or court of first instance.

The following papers are required by the court:—

PROOF OF FOREIGN  
JUDGMENTS.

A copy of the judgment collated by the court in which it was given, accompanied by the '*formule exécutoire*' according to the law of the country.

This is to be certified by the Russian Legation or Consul and countersigned by the Russian Minister of Foreign Affairs for the legalisation of the signatures of the Minister Plenipotentiary or Consul abroad.

A Russian translation of the judgment: together with copies of these documents.

The court does not examine it on the merits, but treats it as an *ex parte* application (*matière sommaire*).

Its examination of the competency of the foreign tribunal is to be determined by the law of that country: but this may be examined if it be against international law.

It may also enquire into it if it relates to immoveables in Russia:

Also to see if the parties were regularly cited and the rights of defence respected:

And whether it is of the force of *res judicata* at home, or whether an appeal is pending.

A divorce between Russian subjects belonging to the orthodox Greek Church will not be recognised.

There is a treaty with France, 11 January, 1787, [set out on page 457].

[F. SILVELA, J. D. I. P.  
1881, p. 20.]

## SPAIN.

[Colonies:—BALEARIC ISLANDS, MAJORCA, MINORCA and IVIZA; CANARY ISLANDS, PHILIPPINE ISLANDS, CUBA, PUERTO RICO, FERNANDO PO and ANNABON, CAROLINE ISLANDS and PALAOS, MARIAN ISLANDS.]

Constitution and jurisdiction of the courts.

The judge of the municipality has civil jurisdiction up to 250 *pesetas* (£11).

The District Court (*tribunal de partido*), composed of two

judges, hears appeals from the judge of the municipality, and is the Court of First Instance for all civil matters not coming within his jurisdiction.

There are fifteen Courts of Appeal (*Audiencia*), composed of three judges.

The Supreme Tribunal is analogous to the Cour de Cassation in France.

### *Civil Code.*

s. 98. All foreigners resident either permanently or temporarily are subject to the laws of Spain and to the Spanish tribunals for misdemeanours and crimes committed in Spanish territory, and also for the fulfilment of obligations contracted by them in Spain; or even out of Spain should they be in favour of Spanish subjects. [*Real Decreto*. 1852. s. 29.] Rights over resident foreigners.

s. 99. All foreigners resident either permanently or temporarily are entitled to ask the Spanish tribunals to administer justice on their behalf in respect of the fulfilment of obligations contracted by them in Spain or to be executed in Spain, or when they have reference to property situated in Spanish territory. [*id.*: s. 32.]

s. 100. In the matter of disputes arising between or against foreigners upon obligations contracted in Spain, although it be in neither a real nor a personal action, the Spanish judges will without doubt be fully competent, when it becomes a question of preventing a fraud, to adopt urgent provisional measures in order to prevent a debtor leaving the country to avoid payment, or in order to allow the sale of goods liable to perish by warehousing, or in order to appoint a keeper provisionally for a madman, or to do anything of a similar nature. [*id.*: s. 33.]

### *Code of Civil Procedure. 1855. [Ley de Enjuiciamiento Civil.]*

[The Code was remodelled in 1881, but these sections remain unaltered.]

EFFECT OF FOREIGN  
JUDGMENTS.

s. 922. Sentences pronounced in foreign countries shall have in Spain the force that the respective treaties give them. Treaties.

s. 923. Should there be no special treaties with the nation wherein they may have been pronounced, they shall have the same force that is given by the laws of that nation to judgments pronounced in Spain. Reciprocity.

s. 924. Should the judgment proceed from a nation where, by the jurisprudence, fulfilment is not given to judgments pronounced in Spanish tribunals, it shall have no force in Spain.



## Chapter XIII.

## Defences.

s. 925. Not being comprised in either of the cases whereof the three preceding articles speak, judgments shall have force in Spain if they combine in themselves the following circumstances :—

- i. That the judgment has been pronounced in consequence of the exercise of a personal action.
- ii. That it has not been pronounced in contumacious absence.
- iii. That the obligation for the performance of which it has issued is lawful in Spain.
- iv. That the judgment contain in itself the requisites necessary in the nation in which it may have been pronounced in order to be considered authentic, and those which the Spanish laws require in order to make it evidence in Spain.

## Mode of procedure.

s. 926. The execution of sentences pronounced in foreign countries shall be solicited in the Supreme Tribunal of Justice.

This court, after translation of the judgment has been made in conformity with law, and after hearing the party against whom it is directed and the fiscal attorney, shall declare whether it ought or ought not to be fulfilled.

The procedure more fully is as follows:—A copy of the judgment is to be forwarded to the Supreme Tribunal with an official translation into Spanish. This translation should emanate from the office ‘de l’interpretation des langues’ attached to the ministry of foreign affairs, and should be accompanied by a succinct statement signed by counsel and attorney, establishing the fact that the judgment fulfils the conditions prescribed by the Code of Civil Procedure. The defendant is then summoned to appear within thirty days and is allowed to file written observations. The fiscal attorney or the *procureur* may also file written observations. The court decides the question without a public hearing.

If the judgment is to be executed it is handed over to the judge of the defendant’s domicile : if it is not to be executed the original text of the judgment is returned to the plaintiff indorsed, ‘no ‘cause shown [*no ha lugar*] why this judgment should be executed ‘in Spain.’

It is better for the papers to be presented to the Spanish tribunal ‘*par voie diplomatique*’ in accordance with the royal decree of 17 Sept: 1852 ; either by sending them to the Spanish ambassador in London, or to the English ambassador in Madrid.

The Spanish tribunals are competent to decide upon the diffi-

## Chapter XIII.

culties which may arise relating to the execution of a foreign judgment made executory in Spain. But the method of executing it adopted by the judicial authorities of Spain cannot vary or conflict in any point with the provisions of the foreign judgment, which must in all cases produce its full and perfect effect (*Campo v. Cail*. J. D. I. P. 1881, p. 365).

s. 230. Should the defendant reside in a foreign country, the letter of exhortation shall be addressed in the form that may be laid down by treaties, or in default thereof in the way which the general instructions of the Government may determine.

SERVICE ON ABSENT  
DEFENDANTS.

In this case the judge shall extend the term of the summons for the time that, having regard to the distance and greater or less facility of communication, he may deem necessary.

s. 231. Should the domicile of the defendant not be known, he shall be summoned by means of edicts which shall be affixed in public places, and inserted in the official daily papers of the place wherein the suit is being prosecuted, of the place wherein he had his last residence, and in the *Gaceta de Madrid*; this last when the circumstances of the persons and of the matter require it, according to the opinion of the judge.

Publication.

Without prejudice to this, the preceding summons may be effected in any place where the defendant may be found.

Foreign companies are allowed to bring actions before the Spanish courts, by the provisions of the law of 20 July, 1862, for France, which has since been extended to other countries.

Foreign companies.

### *Ley Hipotecaria. 1861.*

[Grain's Translation.]

s. 5. In the registers may be inscribed documents or titles relating to realty and certain contracts of lease (s. 2) executed in a foreign country, which may have force in Spain in conformity with the laws and executory decrees, wherein are declared the legal incapacity to manage property or the presumption of death of absent persons, the passing of the sentence of interdiction or other sentence whatsoever, whereby the civil capacity of persons may be modified as regards the free disposal of their property, pronounced by foreign tribunals, to which fulfilment must be given in the kingdom in conformity with the law of civil procedure.

Law of hypothec extended  
to foreign judgments in  
certain cases.  
Treaties.

A treaty was entered into between Spain and Sardinia, 30 June, 1851, which has since been held by the Italian Court of Appeal to be still in force as regards Italy; it provides for the sending of

Treaties.

## Chapter XIII.

rogatory letters by the tribunals of one country to those of the other for the mutual enforcing of the judgments of the two countries.

A treaty was also prepared between France and Spain in 1870, but was never signed owing to some invidious remarks made by Senator Bonjean: there is however a treaty between these two countries, 7 Jan: 1862, to exempt French subjects from being required to find security for costs when they are before the Spanish courts, and *vice versa* [set out on page 458].

### *Spanish and Sardinian Treaty, 1851.*

His Majesty the King of Sardinia and Her Majesty the Queen of Spain, ever intent on promoting the interests of their respective subjects, and rendering more and more profitable to them the friendly relations happily existing between the two governments, have regarded as conducive to this end the authorisation—each in his (or her) own State, so far as the laws of the country may permit—of the execution of the judgments in ordinary civil or commercial cases issued by the tribunals of the other State.

Being therefore determined to come to a special convention between the two governments, in order to lay down the rules by which such execution will have to be reciprocally demanded and conceded, plenipotentiaries have, to this end, been nominated for the stipulation of such agreement ;—

s. 1. The judgments or orders in ordinary civil and commercial cases issued by the tribunals of First Instance and Appeal of H.M. the King of Sardinia, and by those of Her Catholic Majesty, and duly authenticated, shall be reciprocally executed by the tribunals of the two States in conformity with what is concluded by the following articles.

s. 2. The execution shall be demanded by the tribunals of First Instance or of Appeal of the one country from those of the other by means of rogatory commissions. When the judgments in question are final, the commission shall be accompanied by the corresponding decree of execution. When, on the other hand, the judgments are not final, before ordering the despatch of the commission the judgment creditor shall ascertain and shall then make express mention of it in his petition that the judgment is no longer open to appeal, if from its nature it requires this condition in order to be capable of execution.

s. 3. In order that the judgments or orders of the tribunals of the one country may be executed by the competent tribunals of First Instance or Appeal of the other, the same must be previously declared to be executory by the superior tribunal within whose jurisdiction or territory the execution is to take effect. This declaration, however, shall not be made in the following cases :—

- i. When the judgment or order bears on its face manifest injustice.
- ii. When it is null through defect of jurisdiction, of service or of warrant.
- iii. When it is contrary to the prohibitive laws of the kingdom in which its execution is demanded.

s. 4. The judgments pronounced by the tribunals of H.M. the King of Sardinia shall have the effect of creating hypothec on the property situated in the territory of Her Catholic Majesty, and reciprocally, when they shall have been declared executory in the manner indicated above.

s. 5. Authentic documents recorded in the States of H.M. the King of Sardinia shall have the effect of conferring a charge on the property situated in the territory of Her Catholic Majesty whenever this property shall have been expressly designated in the contract, or *vice versa*.

s. 6. The charge referred to in the two preceding sections shall not attach to any property which is incapable of assignment by the laws of the country in which it is situated.

The carrying out of all the formalities prescribed by law in order that the charge shall take effect shall rest with and be at the charge of the person in whose favour the same shall have been obtained by consent or otherwise.

s. 7. The acts of voluntary jurisdiction passed in the States of His Sardinian Majesty shall take effect in the States of Her Catholic Majesty, and *vice versa*, whenever it shall be declared that no obstacle exists to the execution of the same by the superior tribunal in whose jurisdiction they are to be executed.

s. 8. The present convention is concluded for five years, at the end of which time unless one of the high contracting parties may have declared to the other six months before the expiration of the said term that they desire to put an end to its operation, it shall continue to be in force for one year, and so on failing notice of discontinuance as above.

## CUBA AND PUERTO RICO.

A Code of Civil Procedure was issued in both these colonies 1 July, 1866, based upon the Spanish Code.

## SWEDEN.

[A. W. BJÖRCK.  
K. D'OLIVECRONA.  
J. D. I. P. 1880, p. 83.]  
Constitution and jurisdiction of the courts.

The Courts of First Instance having jurisdiction in all civil and commercial matters are, for the towns the *Radhusrätt*, composed of the Burgomaster and Mayor and four permanent assessors: and for the country districts, the *Häradsrätt*, composed of a judge and twelve permanent assessors.

There are three Courts of Appeal (*Hofrätt*), consisting of five judges, which hear appeals in all cases: they have also a jurisdiction in first instance in certain special matters, including all questions of status, succession, wills, and guardianship.

The Supreme Tribunal (*Könungens Högsta Domstod*) sits in two sections, each composed of four or eight councillors according to the importance of the case, and hears appeals in all matters from the Courts of Appeal. If the decision of the Supreme Tribunal differs on a point of law from the Court of Appeal, the case is re-argued before the full court.

The old law of Vestri Gothia (xiii century) still binds the courts: —‘Le même droit que les étrangers nous accordent, nous voulons ‘les accorder.’

The Code of 1794 still in force, although partially reformed by

## Chapter XIII.

Proposed treaty with  
Norway.

the Code de Procédure Executive, 1877, contains no reference to foreign judgments.

Treaty.

EFFECT OF FOREIGN  
JUDGMENTS.

Efforts have been made to bring about a treaty between Sweden and Norway for the mutual enforcement of judgments of the two countries, but up to the present time they have been unsuccessful, the Norwegian Storting having, 'sous l'influence d'une jalousie 'inexplicable,' refused the advances of the Swedish Diet.

There is a treaty between Sweden and Denmark, 15 June, 1861: but with the exception of Danish, foreign judgments are not recognised in the country: the courts are however said to be gradually advancing towards a general recognition of them.

SERVICE ON ABSENT  
DEFENDANTS.

An elaborate process is provided for the purpose of summoning to the courts an absent defendant who is a Swedish subject: but they refuse to assume jurisdiction over foreigners by process of attaching personalty within the jurisdiction.

As regards realty, a foreigner who possesses an estate in Sweden is obliged to have an agent there authorised to accept service of writs. The name of the agent must be sent to the judge of the district where the estate is situate. If no such agent is appointed, the judge will appoint one who will have the same powers as the regularly authorised agent.

Security for costs.

Security for costs is not required from foreigners.

[M. HAUSSON.]

## NORWAY.

Constitution and juris-  
diction of the courts.

All disputes are first taken before a Conciliatory Commission (*Fortligelses-commission*) composed of two members. This Commission has jurisdiction to decide contested cases up to 120 crowns (about £6 10s.): and all others if the defendant does not appear or admits the debt.

If conciliation is impossible the parties are sent to the Court of First Instance (*Underet*), composed of a judge and two assistants, which have jurisdiction in all civil and criminal matters. There are five Superior Courts (*Stiftesoverret*), composed of a president and two judges. Appeals from the inferior courts are allowed in all cases over 32 crowns. The Court of Christiania (*Byret*) is an inferior court composed of a judge and eleven assessors: the appeal lying direct to the Supreme Court.

The Supreme Court (*Hoiesteret*) is composed of seven judges; appeals from the superior courts are allowed in all cases over 400 crowns: from the Court of Christiania in all cases, and from the Courts of First Instance in certain cases including maritime matters, protested bills of exchange and bankruptcy.



Prior to 1815, the Norwegian Common Law was the same as the Danish, the writings of Anders Sandó Orsted being the authoritative commentaries upon it.

M. Schwiegaard's writings are considered the best expositions of the law which have come into existence since that date.

The 'jalousie inexplicable' of the Norwegian Storting referred to under Sweden as having prevented the conclusion of a treaty between the two countries, is thus explained by M. Hausson, a distinguished member of the Norwegian bar. In Sweden there are no recognised bodies of solicitors and barristers. So long as this continues, the Norwegians, though holding the Swedish judges in the highest respect, feel for obvious reasons that they are not justified in entering into the proposed treaty.

Proposed treaty with Sweden.

Foreign judgments are not recognised, the whole matter being gone into again before the Norwegian courts: respect however being paid to the opinion of the foreign court.

EFFECT OF FOREIGN JUDGMENTS.

Security for costs is not required from foreigners.

Security for costs.

Where a cause of action arises in Norway, an absent foreigner may be summoned by means of a notice served at his last dwelling place: there is no further publication of the writ, but the time allowed for appearance is one year and six weeks. If judgment is given against him, execution may issue upon any of his goods to be found in the country.

SERVICE ON ABSENT DEFENDANTS.

Time for appearance.

## SWITZERLAND.

The Federal Tribunal has an original civil jurisdiction, in ordinary actions on the request of one of the parties if the amount involved is more than 3000 francs (£120): and, in divorce, in the case of mixed marriages: it also has an appellate jurisdiction from the Courts of Appeal of the Cantons when federal laws are involved and the amount in dispute is more than 3000 francs.

[A. ROGUIN.  
J. D. I. P. 1883, p. 113.  
CHARLES BROCHER.]  
Constitution and jurisdiction of the courts.

By consent of parties it will hear appeals from the Courts of First Instance of the Cantons.

There exist in Switzerland both Federal Law and Cantonal Law; where there is any conflict the former prevails. The Federal law up to the present time has made no provision towards assimilating the procedure of the Cantons in the matter of foreign judgments; each Canton having its own code. Final judgments in civil matters given in one Canton are executory throughout the whole of Switzerland. [*Constitution Fédérale*, s. 61.]

Cantonal judgments.

By s. 59 of the same constitution it is provided that a debtor is

**Chapter XIII.**

Treaty.

always to be sued before the tribunal of his domicil, unless it is otherwise provided by treaty.

There is a treaty with France, 15 June, 1869, 'sur la compétence judiciaire et l'exécution des jugements,' for the mutual enforcement of the judgments of the two countries. [Set out on page 458.]

Procedure to obtain  
*exequatur*.

**APPENZELL.**

The demand for *exequatur* is carried before the Commission d'État (the executive authority of the Canton). There are no special rules to guide the decision, the execution itself being carried out under the supervision of the president of the 'tribunal de la commune.'

Procedure to obtain  
*exequatur*.

**ARGOVIA.**

*Code of Civil Procedure. 1851.*

ss: 421, 422. In the ordinary case of a foreign judgment, the demand for execution is addressed to the prefect of the district: the only question to be considered being whether the foreign state would enforce an Argovian judgment without examination of the merits: if it would not, execution is refused. An appeal lies to the Ministry of Justice, and thence to the Conseil d'État.

Judgment by default.

But where the judgment is by default the demand is addressed to the Supreme Court, the defendant being heard but not as to the merits of the case.

**BALE-VILLE.**

*Code of Civil Procedure. 1875.*

*Execution of [awards and] judgments given by courts outside the Canton.*

EFFECT OF FOREIGN  
JUDGMENTS.  
—

s. 258. The execution of [awards and] foreign judgments should either follow the summary procedure for the recovery of debts, or, in case it is opposed, the usual procedure. The regulations provided in these two methods must be followed, subject to the following exceptions:—

The merits of the case must not be discussed; therefore defences based on considerations of justice or equity are inadmissible.

Defences.

Execution will only be refused in the following cases:—

- i. Absence of jurisdiction.
- ii. Want of executory forms or proper authentication.

- iii. Defences drawn from the nature or the extent of the demand for execution, particularly on the subject of costs.
- iv. Complete or partial satisfaction.

## BALE-CAMPAGNE.

### *Code of Civil Procedure. 1867.*

ss: 267-273. A foreign judgment for a sum of money must receive execution by the ordinary procedure for the recovery of debts: all others must be made the subjects of decrees of execution given by the prefect of the government for the district.

*Procedure to obtain  
exequatur.*

The merits of the case are not discussed: the enquiries of the prefect are limited to the jurisdiction and the due fulfilment of the requisite formalities. An appeal lies to the government.

## BERN.

The Justice of the Peace has jurisdiction up to 25 *livres* (about £1 10s.) ; and to any amount by consent of parties.

*Constitution and juris-  
diction of the courts.*

The President of the District Court has jurisdiction up to 200 *livres*. The Court itself in all other cases, and in matrimonial matters.

The Supreme Court, composed of the president and six judges, hears appeals in all cases over 200 *livres* ; and in all cases by way of cassation.

### *Code of Civil Procedure. 1847.*

s. 391. With regard to foreign judgments the Court of Appeal has in the first instance to decide on its admissibility to execution, after hearing the defendant. If the court decides that the judgment is to be executed, it is to be considered equivalent to a judgment of the Canton.

*EFFECT OF FOREIGN  
JUDGMENTS.*

s. 11. i. Personal actions must as a rule be instituted in the court of the district in which the defendant is domiciled.

ii. Persons not regularly domiciled within the Canton may be sued in the place where they are residing at the time.

### *Law as to Execution for Debts. 1850.*

On the *ex parte* statement of the creditor, alleging that he has a monetary claim against A. B. the court issues a writ for payment (*Zahlungsaufforderung*). (s. 427.) If the debtor raises any objection within a fortnight, the creditor must bring a regular action (ss: 431, 436) ; if no objection be raised to the writ execution is granted

*Summary procedure.*

## Chapter XIII.

(s. 443). The Code lays down the rules with regard to jurisdiction in this special procedure.

s. 413. In the case of debts not secured by mortgage the enforcement of the claim must as a rule take place in the district in which the debtor is domiciled. In the case of persons not domiciled within the Canton the writ may (if *any* proceeding against them be permissible in the courts of the Canton\*) be issued in the court, in the district of which they happen to reside, or where they have any property.

If the debtor's actual place of residence be unknown or if the institution of proceedings against a debtor domiciled outside of the Canton be refused by the authorities of the place in which he is domiciled, the creditor has the option of having the writ issued where he (the debtor) has any property, or in the place of his origin, or in the last place in which he resided. Notice of the issue of the writ shall in that case be given in the official gazette, and shall be posted on the notice-board; all further steps are effected by notice on the board. If the debtor changes his residence † before execution has taken place the further steps are continued in his new place of residence.

In the case of debts secured by mortgage the forum of the subject-matter is the proper forum (s. 17), but the prescribed communications are always to be directed to the place where the debtor resides, if possible by the intervention of the judge who has jurisdiction.

## FRIBOURG.

*Code of Civil Procedure.*

s. 653. With regard to foreign judgments their right to be admitted to execution must be the subject of a preliminary investigation by the Supreme Court of the Canton. If it is found that the judgment can be executed, it is to be executed in the same manner as a judgment of the Canton.

In practice it seems that the enquiry before the Supreme Court is *ex parte* and limited to a formal proof; if there is no treaty the condition of reciprocity is required; the *exequatur* is then

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\* *i.e.* If the court has any jurisdiction in the matter for instance in action for damages arising out of a tort committed within the district of the court (s. 13), or if a claim be made against the undivided estate of a person who died within the district of the court (s. 15), etc.

† This applies only to changes of residence within the Canton of Bern.

granted with a reservation to the defendant to raise any defence before one of the inferior courts.

## GENEVA.

The Justices of the Peace have a summary jurisdiction up to 200 francs (£8). Constitution and jurisdiction of the courts.

The Civil Tribunal, composed of a judge and two assessors, has jurisdiction beyond 200 francs.

The Court of Commerce, composed of three judges, has jurisdiction in all commercial matters.

The Court of Justice, composed of two judges and three assessors, has an appellate jurisdiction from the Civil and Commercial Courts in matters above 500 francs, and by way of *cassation* from the Justices of the Peace.

### *Code of Civil Procedure. 1819.*

s. 376. Judgments given and documents recognised out of the jurisdiction of the Canton cannot be executed within it, until they have been declared executory by the civil tribunal, the parties being heard and duly cited and the public minister heard, without prejudice to contrary dispositions which may exist in treaties or concordats [or in the Federal constitution].

EFFECT OF FOREIGN  
JUDGMENTS.

s. 377. All execution shall be null and void which has been followed up in contravention of the preceding article.

### *Law. 28 June, 1830.*

s. 3. The same conditions are required in order to enable foreign judgments to be entered in the registers of the office of hypothecs and thus to be clothed with the publicity necessary to make them executory.

The terms of these sections are generally understood to give authority to the tribunal to enquire into the judgment on the merits, and if necessary to modify it before granting an *exequatur* upon it. This authority has by custom resolved itself into leaving the whole matter in each case to the prudence and discretion of the tribunal: the competence of the tribunal being always the first matter enquired into.

The judgment must come before the Genevese tribunal clothed with all the forms necessary to prove its authenticity.



## Chapter XIII

*Law of judicial organisation. 1832.*

As regards judgments coming from other Cantons, reciprocity is demanded.

Assumed jurisdiction.

s. 60. iii. The courts of the Canton assume jurisdiction over non-resident foreigners in respect of obligations contracted by them with persons domiciled in the Canton.

Domicil.

[Those persons only are to be considered as domiciled who have applied for and obtained leave to fix their domicil in the Canton.]

*Law. 5 April, 1876 (modifying the Civil Code).*

Divorce of foreigners.

s. 88. (*Id.*) As regards foreigners in Switzerland, no action for divorce, judicial separation or for nullity of marriage can be allowed to be commenced, unless it be proved that the State whence the parties come will recognise any judgment that may be pronounced in the action.

Status.

The same principle applies to all actions regarding personal status.

Marriage.

s. 135. A marriage contracted abroad under the authority of the laws in force there cannot be declared null unless the nullity shall come into force at the same time according to the laws of the foreign state and the provisions of the present law.

[A. L. E. iv. 510.]

**GLARIS.**

Procedure to obtain *exequatur*.

The Commission d'État grants the *exequatur* on foreign judgments. The parties are cited and an oral examination taken: but the merits of the case are not investigated. A judgment is not enforced if it is contrary to federal or cantonal law.

*Civil Code, 1870.*

Marriage of foreigners.

s. 34. A foreigner marrying in the Canton must produce a certificate from the foreign authorities that there is no just impediment, and that the marriage will be recognised together with all its legal consequences.

s. 38. Foreigners cannot be married in the Canton without the authorisation of the 'Commission d'État.'

**GRISONS.**

EFFECT OF FOREIGN  
JUDGMENTS.

*Code of Civil Procedure.*

s. 305. Judgments of other Cantons are to be executed subject to the following conditions:—

i. If its conclusiveness and executory character according to the law of the Canton whence it emanates have been certified by the competent authority of that Canton.

ii. If there is no judgment of a court in Grisons having a contrary effect, and if those courts according to their own law have not exclusive jurisdiction in the matter: unless the defendant has submitted to the jurisdiction of the foreign court.

s. 306. Subject to the same conditions, and subject also to treaties, foreign judgments in civil matters are to be executed in like manner at the request of the foreign authority.

In all other cases foreign judgments can only be made use of as evidence, as to the value of which the judge is to decide according to the ordinary rules.

s. 307. The Government (*petit conseil*) decides all questions relative to the execution of judgments.

## LUCERNE.

### *Code of Civil Procedure. 1850.*

EFFECT OF FOREIGN  
JUDGMENTS.

s. 315. With reference to the execution of judgments given by courts outside the Canton, the following rules apply:—

(a). (as to judgments coming from other Cantons.)

(b). if the judgment comes from a foreign country, a petition for *exequatur* must be addressed to the court of the district in which the defendant is domiciled. This court will decide the matter, subject to an appeal to the Superior Court. The judges are required specially to see if the foreign country would enforce a judgment from Lucerne.

## NEUCHÂTEL.

### *Code of Civil Procedure. 1882.*

EFFECT OF FOREIGN  
JUDGMENTS.

s. 864. Judgments and final decrees in civil or commercial matters given by foreign courts or arbitrators, shall be executed in the Canton when they have acquired executory force.

s. 865. The demand for *exequatur* shall be submitted to the Procedure. Court of Appeal, from whose decision there is no appeal.

s. 866. The demand shall be brought before the court by a formal petition addressed to the President of the Court of Appeal supported by affidavit (the whole in duplicate) containing,

a. A copy of the judgment or decree authenticated by the proper authority of the foreign state;

b. A certificate, also authenticated, from the registrar of the foreign court, that no appeal or stay exists in any form.

## Chapter XIII.

Defences.

s. 867. The Court of Appeal should authorise the execution of judgments coming from the Swiss Cantons, or from countries with whom Switzerland has entered into treaties concerning the execution of judgments.

Execution can only be refused in the following cases :—

- a.* If the decision emanates from a court not having jurisdiction.
- b.* If it has been given and the parties were not duly cited, or were not legally represented, or were in default.
- c.* If it would militate against the public law and order of the Canton to enforce it.

s. 868. The translation of all the documents may be required according to the provisions of s. 267.

s. 869. The President of the Court of Appeal forwards one copy of the petition to the defendant and fixes a time within which he is required to file an answer to it.

In all cases, when the regularity or irregularity of the judgment is evident, the petition is submitted by the President to the Court, who may admit or reject it without any previous communication to the opposite party.

s. 870. The answer is to be in duplicate, one of the copies being forwarded to the petitioner.

s. 871. At the expiration of the time allowed the court decides on the petition, the answer (if any) and the documents transmitted by the parties.

If the answer is not received in time, the court will proceed without it.

s. 872. The president may summon the parties before the court to hear verbal statements. The judgment is delivered at once.

## SAINT-GALL.

EFFECT OF FOREIGN  
JUDGMENTS.*Code of Civil Procedure. 1850.*

s. 246. Judgments emanating from tribunals outside the Canton are executory in the Canton, if,

- a.* No judgment of a competent court of a Canton has been given in the same matter ;
- b.* The foreign court had power to decide the case by virtue of the laws of Saint-Gall or international treaties ;
- c.* Reciprocity is established either by a declaration of the foreign state, or in any other positive manner.

It would seem that no application to the court for an *exequatur* is necessary.

## Chapter XIII.

## SCHAFFHOUSEN.

The Courts of First Instance entertain all demands for *exequatur* on foreign judgments, subject to appeal to the Superior Court. They are made executory only if they have executory force in their own country, and if the court had jurisdiction at the commencement of the suit according to the laws of the Canton. [Code of Civil Procedure, s. 345].

Procedure to obtain  
*exequatur*.

By a decree of the great council, 19 February 1862, the condition of reciprocity has been added: in the case of judgments emanating from the Grand Duchy of Baden reciprocity is assumed.

## SCHWYTZ.

The demand for *exequatur* is taken before the Prefect, who allows a certain time to the defendant to answer, and from his decision an appeal lies to the *Conseil d'État*.

Procedure to obtain  
*exequatur*.

## SOLEURE.

Permission of the judge having been obtained, execution issues on a foreign judgment in the same way as on a home judgment.

Procedure to obtain  
*exequatur*.

## TESSIN.

*Civil Code. 1838.*

s. 1153. The same as Code Napoléon, s. 2123 [p. 449].

*Code of Civil Procedure. 1843.*

s. 346. Foreign judgments, not by default, whether they concern the subjects of the Canton alone, subjects and foreigners, or foreigners alone, cannot be executed without a previous decision authorising it, all parties interested being duly cited.

EFFECT OF FOREIGN  
JUDGMENTS.

Judgment by default.

The defendant may not raise any defence on the merits which has been raised and decided upon by the judgment.

The petition, addressed to the Court of First Instance, is examined according to the oral procedure. The authorisation having been given, the foreign judgment becomes executory, security being given; but the decision is subject to appeal.

## THURGOVIA.

*Code of Civil Procedure. 1867.*

s. 292. With regard to the execution of a foreign judgment, a petition must be addressed to the Supreme Court, which decides whether it should be satisfied.

Procedure to obtain  
*exequatur*.

## Chapter XIII.

## UNTERWALDEN.

Procedure to obtain  
*exequatur*.

The *Conseil d'État* authorises the execution of foreign judgments; the condition of reciprocity being required.

In OBWALD, the defendant may attack either the form or the merits of the judgment:

In NIDWALD, the merits may not be raised, execution being granted if it is expedient.

## URI.

Procedure to obtain  
*exequatur*.

The Prefect of the Government, subject to an appeal to the Government itself, hears all petitions with regard to allowing execution on foreign judgments.

## VALAIS.

Procedure to obtain  
*exequatur*.

All the documents relating to the foreign judgment are forwarded to the Ministry of Justice: the question is then referred to the Conseil d'État, the defendant is then summoned, and execution allowed, the condition of reciprocity being required.

The merits of the case are not gone into, the enquiries being directed to the competence of the court, and to the regularity in point of form. An affidavit may be required to prove that the judgment is final. A decision contrary to federal or cantonal law and public order will not be enforced, nor if it is manifestly unjust, nor if it has been given in violation of the laws of the *forum domicilii*.

## VAUD.

*Code of Civil Procedure. 1866.*

Procedure to obtain  
*exequatur*.

s. 519. A judgment given outside the Canton can only be made executory in virtue of a declaration by the *Conseil d'État*, a right of appeal reserved to the opposite party.

The petition and answer are to be in writing: in important cases reasons will be received from both sides. Execution will be refused for informalities; and after the merits have been gone into, for a violation of the public law and order, or of an international convention.

*Civil Code. 1871.*

s. 9. A Vaudois may be summoned if domiciled in the Canton, for obligations contracted with foreigners in foreign countries.

s. 674. *b*. The judge may sequester the goods in the Canton of any one though not domiciled there.



*Code of Civil Procedure. 1871.***Chapter XIII.**

s. 4. Absent foreigners may be summoned in the cases mentioned in section 8 of the Civil Code: that is to say,

SERVICE ON ABSENT  
DEFENDANTS.

—  
In what cases.

- i. in civil actions resulting from a fault or offence committed in the Canton.
- ii. in real actions concerning property situated in the Canton.
- iii. where in an agreement signed in any country there is a stipulation to submit disputes to the tribunals of the Canton.
- iv. where the defendant having been domiciled in the Canton, has no known domicil, if the action be commenced within three months of his leaving the Canton.

**ZUG.**

Execution on a foreign judgment is granted by the Conseil d'État; the whole question may be re-opened.

Procedure to obtain  
*exequatur*.

**ZURICH.**

The Justices of the Peace have a summary jurisdiction up to 50 francs (£2); beyond that amount their functions are simply conciliatory.

Constitution and juris-  
diction of the courts.

The President of the District Court has summary jurisdiction above 50 and up to 200 francs. The District Court in all other cases, and by way of cassation from the Justices of the Peace.

The Court of Commerce has jurisdiction in all commercial matters.

The Superior Tribunal is the Court of Appeal from the District Court, and the Cour de Cassation in other cases.

The Cour de Cassation, composed of nine judges, is the final Court of Appeal from the Superior Tribunal and the Court of Commerce.

*Code of Civil Procedure. 1874.*

s. 752. As regards the execution of foreign judgments in civil matters, international treaties are conclusive where they exist. As regards judgments from states with which no treaties exist, the Zurich judge may grant execution at his discretion after examination of all the circumstances, provided that the judgment in question be not subject to any appeal, and provided it be signed by a judge who has jurisdiction according to the law governing him, and where jurisdiction is not excluded by the Zurich law.

EFFECT OF FOREIGN  
JUDGMENTS.

‘The Zurich courts do not easily ignore a foreign judgment, at least they do not do so if it is clear that the formal and material

## Chapter XIII.

'requirements of a proper procedure have been complied with.'  
[Meile's *Commentary on the Code.*]

SERVICE ON ABSENT  
DEFENDANTS.

In what cases.

s. 215. Persons not domiciled in Switzerland can be sued in the place where the contract ought to have been performed, according to the intention of the parties, in actions for specific performance, rescission or damages, if the defendant resides in that place, or any property of his subject to execution is situated there.

This section only applies to actions arising out of contracts. Property includes chattels and choses in action (as well as real property).

s. 185. Writs against persons residing outside of the Canton are sent to the competent authority in the place where the person to be served is domiciled, together with a request to serve them.

s. 191. If the writ cannot be served on the person concerned, a public citation (*Edictalladung*) takes the place of the special writ. The same has to be effected by insertion in the official gazette and according to circumstances in other public journals. The documents proving that this has been done must be made part of the record.

## TURKEY.

[including in Europe—BULGARIA, EAST ROUMELIA, and BOSNIA; and in Asia—ASIA MINOR, SYRIA, PALESTINE, MESOPOTAMIA and WEST ARABIA.]

*Law of 7 Sepher 1284 [A.D. 1873].*

Conceding to strangers the right to possess immoveables in the Empire: and relating to those countries only who have adhered to the Protocol of the Sublime Porte relative to this law: [of which countries Great Britain is one].

Jurisdiction over foreign  
owners of property.

s. 2. iii. The owner of the property is to submit to Ottoman tribunals on all questions relating to the property, even if the other party be a foreigner, without being able to plead effectually his own nationality, subject to the reserves and immunities agreed upon by treaties.

s. 3. In case of bankruptcy of the foreign proprietor, the syndics of the bankrupt may require from the Ottoman tribunals an order for the sale of property which from its nature and according to law is held answerable for the debts of the owner.

The same thing shall happen when a foreigner has obtained a '*jugement de condamnation*' before a foreign tribunal against another foreigner who is owner of immoveables in the Empire.

To obtain execution of this judgment against the property, the creditor must move the competent Ottoman authority for an order to obtain the sale of such immoveables as are held answerable for the debts of the proprietor. But this judgment shall only be executed by the authorities and tribunals of the Empire when they shall have ascertained that the property required to be sold really belongs to the category of those which may be sold to pay the debt.

### Chapter XIII.

#### EFFECT OF FOREIGN JUDGMENTS.

#### *Code of Commercial Procedure. 1867.*

#### SERVICE ON ABSENT DEFENDANTS.

s. 12. Absent defendants are to enter appearance within the following times:—

Time for appearance.

Cyprus, Crete, and the Archipelago . . . . .	2 months
Egypt, Tripoli, Tunis, and States bordering on the Ottoman Empire . . . . .	4 „
Other European States . . . . .	6 „

In time of war these periods are doubled.

s. 20. (2). Companies may be sued by their manager, service being effected at the place of business: if there is no place of business a partner may be served where he is domiciled.

(4). For those who have no domicile nor known residence in Turkey the writ shall be affixed, by order of the President of the Court, in the hall of the court where the action is brought, and a copy shall be inserted in the papers, chiefly in those which, according to the defendant's circumstances, will be the most likely to be read by him.

Defendants with no known residence.

(6). For those resident in foreign countries, the writ shall be transmitted by letter from the President of the Court to the Minister of Foreign Affairs to be sent by him as soon as possible to the defendant's residence. The usher is to take a written receipt from the post-office to assure the letter having been posted.

Defendants resident in foreign countries.

#### *Protocol. 24 February 1873. For the Province of Tripoli.*

The Sublime Porte engages that actions between natives and English, French or Italian subjects shall be tried according to the capitulations in force, and in the same way as in the other Ottoman Provinces.

Tripoli.

# CHAPTER XIV.

## Chapter XIV.

## THE LAWS OF THE UNITED STATES OF NORTH AMERICA.

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\* We have been unable to obtain copies of the Codes of these States.

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THE principles adopted by the courts of the North American States on the subject of foreign judgments closely resemble the English doctrines. As the cases which have been decided both by the Supreme Court of New York and the courts of the individual States are collected in Story's Conflict of Laws, side by side with the English decisions, it has been thought unnecessary to add to the length of this chapter by referring to them: where any new principle is to be drawn from them, it has been incorporated into the text of the preceding chapters.

It will be noticed that in all those States in which constructive notice by publication is allowed when the defendant is non-resident, personal service on the defendant out of the jurisdiction is also allowed, and is equivalent to service by publication. The English method of serving only a notice of the writ on a foreigner out of the jurisdiction in lieu of the writ itself has not yet been adopted in the American Codes of Procedure.

Personal service out of jurisdiction.

## NEW YORK.

In an action on a foreign judgment the defendant may require from the plaintiff, whether citizen or alien, security for costs to the extent of \$250.

Security for costs in action on judgment.

### *Code of Civil Procedure. 1877.*

#### STATUTE OF LIMITATION.

s. 390. Where a cause of action which does not involve the title to, or possession of real property within the State, accrues against a person who is not then a resident of the State, an action cannot be brought thereon in a court of the State against him or his

If foreign statute bars remedy (except as to realty) defence is good; except in favour of resident.



**Chapter XIV.**

personal representative after the expiration of the time limited by the laws of his residence for bringing a like action, except by a resident of the State, and in one of the following cases :—

- i. Where the cause of action originally accrued in favour of a resident of the State.
- ii. Where before the expiration of the time so limited, the person in whose favour it originally accrued, was or became a resident of the State, or the cause of action was assigned to, and thereafter continuously owned by, a resident of the State.

Designation of person to accept service.

s. 430. A resident of the State may execute a deed designating a person upon whom service may be made in his absence.

Service on foreign companies.

s. 432. A copy is to be delivered within the State as follows :—

- i. To the president, treasurer or secretary ; or if the corporation lacks either of these officers, to the officer performing corresponding functions under another name.
- ii. To a person designated for the purpose by the president.
- iii. If such a designation is not in force, or if neither the person designated, nor an officer specified in (i.) can be found with due diligence, and the corporation has property within the State, or the cause of action arose therein ; to the cashier, a director, or a managing agent of the corporation within the State.

s. 433. The last section applies to the service of process or other paper whereby a special proceeding is commenced in a court, or before an officer, except a proceeding to punish for contempt, and except where special provision for the service thereof is otherwise made by law.

Proof of service.

s. 434 provides the method for proof of service.

SERVICE ON ABSENT  
DEFENDANT.  
—

s. 438. An order directing the service of a summons upon a defendant without the State, or by publication, may be made in either of the following cases :—

In what cases.

- i. Foreign companies ; or, natural persons not being residents of the State.
- ii. Absence of defendant from State to avoid service or defraud creditors.
- iii. Where a resident of the State has been continuously without the United States more than six months next before the granting of the order, and has not designated anybody to accept service, or the person designated cannot be found in the State.

- iv. Where the complaint demands judgment against a resident of the State annulling a marriage, or for a divorce, or a separation.
- v. In all actions affecting the title to real or personal property, the defendant being a resident of the State or a domestic corporation.
- vi. In actions commenced sixty days next before the expiration of any period limiting the action under the statutes of limitation.
- vii. Where the action is against the stockholders of a corporation, or joint stock company, and is authorised by the law of the State, and the defendant is a stockholder thereof.

s. 439. The plaintiff when he applies for the order, must present Affidavit required.  
to the judge a verified complaint, showing the cause of action for which judgment is demanded against the defendant to be served. Proof, by affidavit, must also be made of the additional facts required by s. 438.

s. 440. The order may be made by a judge of the court, or Order thereon, by whom made.  
the county judge of the county where the action is triable.

It must direct either publication in two newspapers for a certain Publication.  
time not less than once a week for six successive weeks; or, at the option of the plaintiff, personal service upon the defendant without the State: further, that on the first day of publication the plaintiff post to the defendant one or more sets of copies of the summons, complaint and order; or a statement that the judge dispenses with this, being satisfied that the defendant cannot be found with reasonable diligence.

s. 441. The first publication is to be made within three months after the order is granted.

For the purpose of reckoning the time within which the Time for appearance.  
defendant must appear or answer, service by publication is complete upon the day of the last publication pursuant to the order; and service made without the State is complete upon the expiration thereafter of a time equal to that prescribed for publication.

ss: 442. 443. Where service is made by publication or without Papers to be filed.  
the State, the summons, complaint and order, and the papers upon which the order was made, must be filed with the clerk on or before the day of the first publication; and a notice subscribed by the plaintiff's attorney and directed only to the defendant or defendants to be thus served, substantially in the following form,

**Chapter XIV.**

	the blanks being properly filled up, must be subjoined to and published with the summons :
Form of notice.	“To . . . . The foregoing summons is served upon you, by publication ( <i>or</i> , without the State of New York) pursuant to an order of                      dated                      and filed with the complaint, in the office of the clerk of                      at                      .”
Proof of publication.	s. 444. Proof of publication is to be by affidavit of the printer or publisher or his foreman or principal clerk. Proof of posting or delivery, by affidavit of the person who posted or delivered it.
Defendant's appearance after judgment, within what time.	s. 445. If the defendant does not appear, he may show cause within one year after service of written notice of final judgment : or if there has been no such service, within seven years after the filing of the judgment. If he is successful, the court may order restitution : but <i>bonâ fide</i> purchasers shall not be affected.
Trustee process.	ss: 635-712 relate to Attachment of Property, or Trustee Process.
In what actions a warrant of attachment may be granted.	s. 635. A warrant of attachment against the property of one or more defendants in an action, may be granted upon the application of the plaintiff as specified in the next section where the action is to recover a sum of money only as damages for one or more of the following cases :— i. breach of contract, express or implied, other than a contract to marry ; ii. wrongful conversion of personal property ; iii. any other injury to personal property in consequence of negligence, fraud or other wrongful act.
What must be shown to procure the warrant.	s. 636. To entitle the plaintiff to such a warrant, he must show by affidavit to the judge granting the same, as follows :— i. That one of the causes of action specified in the last section exists against the defendant. If the action is to recover damages for breach of a contract, the affidavit must shew that the plaintiff is entitled to recover a sum stated therein, over and above all counterclaims known to him ; ii. That the defendant is either a foreign corporation or not a resident of the State ; or, if he is a natural person and a resident of the State, that he has departed therefrom with intent to defraud his creditors ; etc: ss: 914-920 relate to depositions taken within the State for use without the State.
PROOF OF FOREIGN JUDGMENTS. —	s. 952. The copy of the record is to be accompanied by,

- i. an attestation by the clerk of the court with the seal of the court affixed ; or by the officer in whose custody the record is legally kept, under the seal of his office ;
- ii. a certificate of the chief judge or presiding magistrate of the court, that the person is clerk or officer ; and that his signature to the attestation is genuine ;
- iii. a certificate under the Great Seal of the Government or Secretary of State or other officer having custody of the Seal, to the effect that the court is duly constituted, specifying generally the nature of its jurisdiction : and that the signature of the chief judge is genuine.

s. 953 provides an alternative and less elaborate method.

Other proof.

- i. The copy is to be compared by the witness with the original, who is to prove that it is an exact transcript of the whole of the original ;
- ii. also that the original was, when the copy was made, in the custody of the clerk of the court, or other officer legally in charge ;
- iii. also that the attestation is genuine.

[see the cases *Vandervoort v. Smith* (2 Caine 155), and *Jarvis v. Sewall* (40 Barbour, 449.)]

s. 954. Nothing in this article is to be construed, as declaring the effect of a record or other judicial proceeding of a foreign country, authenticated, so as to be evidence.

s. 956. A copy of a patent, record or other document remaining of record in a public office of a foreign country, certified according to the form in use in that country is evidence, when authenticated, as follows :—

Documents from foreign countries ;  
how authenticated.

i. By the certificate under the hand and official seal of a commissioner appointed by the governor to take the proof or acknowledgment of deeds in that country, to the effect that the patent record or document is of record in the public office, and that the copy thereof is correct and certified in due form ;

ii. By a certificate under the hand and official seal of the Secretary of State annexed to that of the commissioner, to the same effect as prescribed by law for the authentication of the certificate of such a commissioner upon a conveyance to be recorded within the State. The certificate of the commissioner, thus authenticated, is presumptive evidence that the copy of the patent, record or document is certified according to the form in use in the foreign country.

## Chapter XIV.

**ALABAMA.***Code. 1867.*

If foreign statute bars  
remedy, defence good.

s. 2911. If the laws of another country bar a suit upon a contract or act done there whilst the party sought to be charged thereby was a resident of such country, it is barred in the same manner here.

Effect of foreign probate.

s. 1949. A will proved in another country may be admitted to probate in this State: The will or copy with probate annexed is to be certified by the clerk of the foreign court in which the will was proved; and a further certificate of the judge that the attestation is genuine.

Action by foreign  
administrator.

s. 2293. An action may be maintained and property recovered by a foreign administrator by, first, recording a copy of letters of administration duly authenticated according to the law of the U. S. in the office of the judge of probate in the country where the property is situate; and, secondly, by giving a bond.

**ARKANSAS.***Laws. c. 106.*

ss. 15. 19. Actions on home judgments are barred in 10 years; and on foreign judgments (presumably) in 5 years.

**CALIFORNIA.***Laws. c. 120.*

Wills proved beyond the  
State.

s. 27. All wills which shall have been duly proved, and allowed in any other of the United States, or in any foreign country or State, may be allowed and recorded in the Probate Court of any county in which the testator shall have left any estate, provided it has been executed in conformity with the laws of this State.

Notice of probate of such  
wills.

s. 28. When a copy of the will, and the probate thereof duly authenticated, shall be produced by the executor, or by any other person interested in the will, the court shall appoint a time of hearing, and a notice shall be given in the same manner as in the case of an original will for probate.

Effect of such wills.

s. 29. If on the hearing it shall appear to the court that the instrument ought to be allowed as the will of the deceased, a copy shall be filed and recorded, and the will shall have the same force and effect as if it had been originally proved and allowed in the same court.



*c. 123.***Chapter XIV.****SERVICE ON ABSENT  
DEFENDANTS.**

s. 30. When the person on whom service is to be made resides out of the State, or has departed from the State; or cannot after due diligence be found within the State; or conceals himself to avoid the service of the summons, and the fact shall appear by affidavit to the satisfaction of the court or a judge thereof, or a county judge, and it shall in like manner appear, that a cause of action exists against the defendant in respect to whom the service is to be made, or that he is a necessary and proper party to the action, such court or judge may grant an order that the service be made by the publication of the summons.

Service by publication.

s. 31. The order shall direct the publication to be made in a newspaper to be designated, as most likely to give notice to the person to be served, and for such length of time as may be deemed reasonable, at least once a week: Provided that publication against a defendant residing out of the State, or absent therefrom, shall not be less than three months.

If the residence is known, copies of the summons and complaint are to be posted to him there.

Personal service is equivalent to publication and posting.

In actions upon contracts for the direct payment of money, the court in its discretion may, instead of ordering publication, or may after publication, appoint an attorney to appear for the non-resident, absent or concealed defendant, and conduct the proceedings on his part.

In actions on contracts.

s. 451. A copy of the record is to be accompanied by,

**PROOF OF FOREIGN  
JUDGMENTS.**

- i. an attestation by the clerk of the court with the seal of the court affixed; or by the officer in whose custody the record is legally kept, under the seal of his office;
- ii. a certificate of the chief judge or presiding magistrate of the court, that the person is clerk or officer; and that his signature to the attestation is genuine; and that the certificate is in due form;
- iii. a certificate of the minister or ambassador of the United States, or of a consul of the United States in the foreign country, that there is such a court, specifying generally the nature of its jurisdiction, and that the signature of the chief judge, or other legal keeper of the record is genuine.

s. 452 provides an alternative and less elaborate method.

Alternative method.

- i. The copy is to be compared by the witness with the original, who is to prove that it is an exact transcript of the whole of the original;

**Chapter XIV.**

- ii. also that the original was, when the copy was made, in the custody of the clerk of the court, or other officer legally in charge ;
- iii. also that the attestation is genuine ; and that the copy is duly attested by a seal which is proved to be the seal of the court, where the record remains, if it be the record of a court ; or if there be no such seal, or if it be not a record of a court, by the signature of the legal keeper of the original.

**STATUTE OF LIMITATION.**

—  
Cause of action arising out of the State.

s. 532. When a cause of action has arisen in another State or in a foreign country, and by the laws thereof an action thereon cannot be maintained against a person by reason of the lapse of time, an action thereon shall not be maintained against him in this State, except in favour of a citizen thereof, who has held the cause of action from the time it accrued.

**COLUMBIA.****Laws. c. 97.****STATUTE OF LIMITATION.**

—  
If foreign statute bars remedy, defence good.

ss: 2. 3. Actions on home judgments are barred in 10 years and on foreign judgments (presumably) in 5 years.

s. 17. If a cause of action has arisen in another country between persons not resident in this State, and is barred there by lapse of time, it is barred here.

**SERVICE ON ABSENT DEFENDANT.**

—  
In what cases.

**c. 81.**

s. 7. If an affidavit is filed that the defendant is non-resident and that a cause of action exists against him, service may be made by publication, in the following cases :—in actions,

- i. relating to realty.
- ii. to establish or set aside a will.
- iii. against non-residents or foreign corporations having property in the district or debts owing to them subject to the process of the court.
- iv. to exclude defendant from his interest in any property in the district : and,
- v. when the defendant avoids service.

Publication of notice.

s. 8. The notice is to be published in some newspaper selected by the court not less than once a week for six weeks.

If the defendant's residence abroad is known, the notice is to be posted to him :

The service is held to be complete at the end of the time ordered.

The publication is to contain a summary of the object and prayer of the petition.

**Chapter XIV.**

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## CONNECTICUT.

*Laws. Tit: 1. c. 2.*

s. 23. If the defendant is absent and possesses property in the State, the writ of summons may be left with his agent; if he possesses land, a copy is to be left at the office of the town clerk where the land lies; if there is no agent, it may be left on the person in charge: Service on agent.

The copy is to be a true and attested copy.

From *Middlebrooks v. Springfield Insurance Co.* (14 Conn: Rep: 301) it would seem that a foreign corporation with only an office in the State cannot be served with a writ.

## GEORGIA.

*Code.*

ss: 2854. 2855. Actions on home or United States judgments are barred in 7 years, and on foreign judgments in 5 years.

s. 3526. A dormant judgment may be revived against an absent defendant, a notice being published in the Gazette once a month for 4 months.

## ILLINOIS.

*Laws. c. 109.*

s. 9. A foreign probate may be recorded in the State if accompanied by a certificate of due execution and proof according to the laws of its own country. Foreign probate.

## INDIANA.

*Code.*

ss: 212. 225. Actions on home or United States judgments are barred in 20 years, and on foreign judgments (presumably) in 15 years.

s. 40. If the plaintiff file an affidavit that the defendant is unknown and is believed to be out of the State, the court may make such order as to notice and publication as may be deemed proper.

SERVICE ON ABSENT  
DEFENDANTS.

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s. 41. Where there has only been service by publication, except

## Chapter XIV.

in the case of divorce, the judgment may be opened and a defence admitted within 5 years.

ss: 42. 43. Notice in such case is to be given to the heirs: the defence is to be filed and an affidavit that there was no actual notice:

*bonâ fide* purchasers of property are not to be affected.

s. 391. Where there has only been constructive notice, the defendant may appear at any time before judgment; time will then be allowed him to prepare for trial.

ss: 392. 393. The plaintiff is required to file an affidavit of the truth of his claim, and may also be required to swear in court, and to answer any interrogatories that may be put to him by the court.

s. 394. Any set-off that may thus be disclosed is to be adjusted.

s. 395. No personal judgment shall be rendered against a defendant constructively summoned who has not appeared in the action.

s. 681. Actions may be brought against a foreign corporation by any person having a cause of action against it within the State where any property belonging to it or debts due to it may be found: If there is no person within the State authorised to transact its business the company may be summoned constructively. (Act of 1858.)

In real actions, the constructive summons is to be published for three weeks successively in a State newspaper in the following cases:—

When they may be sued.

- i. Where the cause of action arises within the State and the foreign corporation has property in the State:
- ii. Where a resident of the State is absent in order to avoid service:
- iii. Where the defendant is non-resident, and the cause of action arises out of a contract, or out of a duty imposed by law, or to enforce or discharge a lien, or to obtain a divorce.

## IOWA.

*Code.*

STATUTE OF LIMITATION.

s. 2529. (v. vi.) Actions on home or United States judgments are barred in 20 years, and on foreign judgments in 10 years.

If foreign statute bars remedy, defence good.

s. 2534. If a cause of action is fully barred in the country where the defendant has previously resided, such bar shall be the same defence in the State.

s. 2618. Service may be made by publication when an affidavit is filed that personal service cannot be made on the defendant within the State in the following cases: in actions,

- i. for the recovery of realty or any interest therein.
- ii. for the partition of realty.
- iii. for the sale of realty under mortgage lien or other incumbrance.
- iv. for specific performance of a contract for the sale of realty within the State; or to establish or set aside a will.
- v. against non-residents or foreign companies having within the State property or debts owing to them sought to be appropriated in any way.
- vi. relating to realty within the State when the defendant has any claim upon it, and the relief claimed in the action is to exclude the defendant from it: This to apply to non-residents and foreign companies.
- vii. when the defendant is absent in order to defeat his creditors.
- viii. for divorce.

s. 2619. The publication is to be made in a newspaper to be selected by the plaintiff. Publication.

s. 2620. The defendant is held to have been personally served: Proof of publication is to be by affidavit of the publisher or his foreman.

ss: 2622—2625 relate to unknown defendants.

ss: 2875—2881 relate to the defendant's appearance and to the plaintiff's proof.

These sections are the same as in the Indiana Code. ss: 40—43; 391—395. [pp: 527. 528.]

s. 3715. The same as New York Code of Civil Procedure. s. 952. [p. 522.]

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##### SERVICE ON ABSENT DEFENDANTS.

In what cases.

##### PROOF OF FOREIGN JUDGMENTS.

ss: 2351—2353. Foreign or United States probates are admitted to probate fully on production of a copy of the will and the original record of the probate attested by the clerk of the court under seal. Foreign probates.

The new probate is to be conclusive as to the due execution thereof until set aside by an original or appellate proceeding.



## Chapter XIV.

**KANSAS.***c. 80. Code of Civil Procedure.*

If foreign statute bars  
remedy, defence good.

s. 22. If a cause of action is barred in the State in which it arose by reason of lapse of time, it is barred here between non-residents.

Foreign companies.

s. 70 provides for service of writ on the managing agent of a foreign company.

SERVICE ON ABSENT  
DEFENDANTS.

ss: 72—77. Constructive service:

the same as in the Indiana Code [p. 528], except that actions for divorce are omitted.

*c. 117.*

Foreign probates.

ss: 25—27. Foreign probates are admitted fully in this State: On production of copy of will and original probate the court continues the motion to admit such will to probate for two months: The notice is published in the newspapers for three consecutive weeks, the first publication to be forty days before the final hearing.

**KENTUCKY.**

STATUTE OF LIMITA-  
TION.

*Revised Statutes. c. 63.*

If foreign statute bars  
action on judgment,  
defence good.

Actions on home or United States judgments are barred in 15 years; and on foreign judgments (presumably) in 10 years.

s. 18. *Action on a foreign judgment.* If the action would be barred in the country where the judgment was pronounced, it is barred here, except in favour of residents in this State, who have had the cause of action from the time it accrued.

If foreign statute bars  
remedy, defence good.

s. 19. *Action on a cause of action.* If the action is barred in the country where the cause of action arose, it is barred here as between any parties.

*Code of Civil Procedure.*

ss: 86. 87 refer to service of writ upon persons out of Kentucky but in the United States.

ss: 88—92. Service generally on absent defendants, the same as in the Indiana Code. [p. 527.]

s. 148. In pleading a judgment the facts giving jurisdiction need not be stated.

This section does not apply to foreign judgments: a general

avement of jurisdiction in the foreign tribunal would not be sufficient. (*Hollister v. Hollister*. 10 How: N. Y. 539.)

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**Chapter XIV.**

## LOUISIANA.

### *Code.*

s. 165. (b). When defendants are foreigners, or have no fixed or known place of residence in the State, they may be cited wherever they are found.

SERVICE ON ABSENT  
DEFENDANTS.  
—

s. 753. When judgments have been rendered in foreign countries, the copies presented shall be considered authentic and admitted in evidence in the tribunals of the State, if they are clothed with all the forms required to prove their authenticity in the countries where they are pronounced.

PROOF OF FOREIGN  
JUDGMENTS.  
—

The Laws of Las Siete Partidas are still in force in the State. Part III. Tit: xxii. Law 15 declares that 'judges sometimes 'compel defendants to appear before them who are of another 'jurisdiction, where the former have no power to hear and determine causes. We therefore say that every judgment rendered 'in such cases is void.'

A foreign judgment to be enforced in the State must be in accordance with the laws of the State; and the defendant must have been personally cited. (*Patterson v. Mayfield*. 10 Louis: Rep: 220. *Warren v. Hall*. ib: 377.)

## MAINE.

### *Code.*

Actions on home or United States judgments are barred in 20 years, and on foreign judgments (presumably) in 6 years.

### *c. 81.*

s. 17. If the defendant was never an inhabitant of the State, or has removed therefrom, service may be effected on his agent, tenant, or attorney.

SERVICE ON ABSENT  
DEFENDANTS.  
—

s. 18. If he has neither, the court may order such notice as justice requires, if such order is complied with and obedience to it is proved to the satisfaction of the court, the defendant is held to answer to the suit as in other cases.

s. 22. In the case of insurance companies out of the State, the agent may be served, or the writ may be left at his last and usual place of abode: or it may be served on the person, an inhabitant

Foreign companies.

## Chapter XIV.

of the State, who signed or countersigned the policy. In either case, the court may direct further notice to the company.

## MARYLAND.

*Code.*SERVICE ON ABSENT  
DEFENDANTS.  
—

Art: 16. ss: 88—98. Service against non-residents may be constructive in suits respecting the sale, partition, conveyance or transfer of any real or personal property lying or being in the State; or to foreclose any mortgage thereon, or to enforce any contract or lien relating to the same, or concerning any use, trust or other interest therein.

## Publication.

The published notice is to contain the substance of the bill and the time appointed for appearance.

In case of default the bill or petition may be taken *pro confesso*, or a commission to take testimony may be issued *ex parte*, and such decree passed as may be just and equitable.

## Appeal.

A bill for review may be filed in 12 months: if against an infant, 12 months after he comes of age, or by his representatives 12 months after his death.

## Foreign companies.

Foreign companies with no agent in the State may be served constructively. The order is to be published once a week for four weeks, or may be served personally three months before the trial.

Art: 75. ss: 99. 100 provide for service on the agent of foreign companies.

PROOF OF FOREIGN  
JUDGMENTS.  
—

Art: 37. s. 35. An exemplification of the record under the hand of the keeper of the same, and the seal of the court or office where such record may be made, is good and sufficient evidence in any court of the State, to prove any debt of record, made or entered in any other of the United States, or in any foreign country. Further, no sentence, judgment or decree, final or interlocutory of any judge, court, board, council or tribunal, having or exercising municipal, admiralty or prize jurisdiction without the limits of the United States and its territories, shall be conclusive evidence in any case or controversy in the courts of this State, of any fact, matter or thing therein contained, stated or expressed, except of the acts or doings of such foreign judge, court, board, council or tribunal:—Provided, that nothing herein contained shall impair or destroy the legal effects of any such foreign sentence, judgment or decree on the property affected or intended to be affected thereby.

## Foreign probates.

Art: 93. s. 324. A copy of the record of any will according to

the laws of the State, under the hand of the keeper of the record and the seal of the court shall be good evidence to prove the will.

**Chapter XIV.**

## MASSACHUSETTS.

### *Laws. c. 126.*

s. 1. No personal action may be commenced against a person out of the State at the time of service of the summons unless before such absence he had been an inhabitant of the State, or unless an effectual attachment of his goods, estate or effects is made on the original writ.

s. 6. If personal service cannot be made, the court may order the action to be continued from time to time until notice of the suit is given in such manner as the court may direct.

s. 8. The plaintiff is required to give a bond before execution is issued, to repay the amount if the judgment is reversed within one year.

SERVICE ON ABSENT  
DEFENDANTS.

—  
In what cases.

## MICHIGAN.

Actions on home or United States judgments are barred in 10 years, and on foreign judgments in 6 years.

## MINNESOTA.

### *Laws. c. 66.*

Actions on home or United States judgments are barred in 10 years, and on foreign judgments (presumably) in 6 years.

ss: 49—51. The procedure as to constructive notice on non-resident defendants is the same as in the Indiana Code [p. 528]: the judgment thereon may be opened within one year.

SERVICE ON ABSENT  
DEFENDANTS.

## MISSISSIPPI.

### *Laws. c. 43.*

ss: 96. 111. Actions on home, United States and foreign judgments are barred in 20 years.

### *c. 46.*

s. 23. Foreign judgments given between persons residing in any foreign kingdom, if certified by the court, or mayor or chief magistrate in the manner such acts are usually authenticated by them; and all foreign judgments as have been given and enregistered in due form according to the laws of such foreign kingdom,

PROOF OF FOREIGN  
JUDGMENTS.

**Chapter XIV.**

and attested by a notary public, with a testimonial from the proper officer of the city where he resides, or the Great Seal of the kingdom, shall be evidence in all the courts of record within this State, as if the same had been proved in the said courts.

**MISSOURI.***Laws. c. 164.*

SERVICE ON ABSENT  
DEFENDANTS.  
—

ss: 13—17. The procedure as to constructive notice or non-resident defendants is the same as in the Indiana Code. [p. 528.]

**NEVADA.***Laws. c. 49.*

STATUTE OF LIMITA-  
TION.  
—

s. 5. Actions on home or United States judgments are barred in 5 years.

s. 8. Actions on foreign judgments or foreign contracts are barred in 2 years.

A right of action shall be deemed to have accrued on a judgment at the time of its rendition.

If foreign statute bars  
remedy, defence good.

s. 9. If a cause of action is barred in the country of its origin by reason of lapse of time, it is barred here.

*c. 83.*

SERVICE ON ABSENT  
DEFENDANTS.  
—

Constructive notice on non-residents and on foreign companies is allowed when it shall appear that a cause of action exists against the defendant.

*c. 103.*

PROOF OF FOREIGN  
JUDGMENTS.  
—

ss: 395. 399. The same as New York Code of Civil Procedure. ss: 952. 953. [pp: 522. 523.]

**NEW HAMPSHIRE.***Laws. c. 207.*

SERVICE ON ABSENT  
DEFENDANTS.  
—

ss: 3. 4. The court may order an action to be continued where there has been no personal service on the defendant, and may give directions as to notice of pendency being published, or being sent by mail; and on satisfactory evidence that such order has been complied with, such notice shall be deemed sufficient.

s. 9. Where the defendant is non-resident and has no property within the State, the action may be entered in court and such notice ordered as the case requires.



**NEW JERSEY.***Laws. Title xxii. c. 3.*

ss: 3. 4. The copies of any last will or testament made in Great Britain and Ireland, or in any of the British colonies, by which any lands, tenements, hereditaments, or other estate within this province, are devised or bequeathed, certified under the seal of the office where such will or testament is proved and lodged, may be given, and shall be received in evidence before any of the courts of judicature within this province, and be esteemed as valid and sufficient as if the original will or testament were then and there produced and proved.

Copies of wills of U.K. and colonies good evidence.

**NORTH CAROLINA.**

Actions on home or United States judgments are barred in 10 years and on foreign judgments (presumably) in 3 years.

The procedure as to constructive notice on non-resident defendants is the same as in the Indiana Code. [p. 528.]

SERVICE ON ABSENT DEFENDANTS.

**OHIO.***Code of Civil Procedure.*

ss: 70. 75. The procedure as to constructive notice on non-resident defendants is the same as in the Indiana Code. [p. 528.]

SERVICE ON ABSENT DEFENDANTS.

The affidavit filed is to be sworn on positive information: and the published statement of the object of the suit and other particulars is to be very precise.

*Code of Civil Procedure before Justices of the Peace.*

s. 17 provides for service on managing agent of foreign companies.

‘Managing’ is to be construed strictly; if there is no managing agent the company is not liable to any proceedings *in personam*. *Barney v. New Albion R. R. Co.* (1 Handy. 571).

**OREGON.***Stat: 2 March 1849.*

Actions on home or United States judgments are barred in 10 years, and on foreign judgments (presumably) in 6 years.

**Chapter XIV.***Civil Code.*SERVICE ON ABSENT  
DEFENDANTS.  
—Proof of certain foreign  
documents.

ss: 55—57. The procedure as to constructive notice on non-resident defendants is the same as in the Indiana Code. [p. 528.]

s. 4. That it may and shall be lawful for the keepers or persons having the custody of laws, judgments, orders, decrees, journals, correspondence or other public documents of any foreign Government or its agents, relating to the title to lands claimed by or under the United States, on the application of the head of one of the departments, the solicitor of the treasury, or the commissioner of the general land office, to authenticate the same under his hand and seal, and certify the same to be correct and true copies: and when the same shall be certified by an American minister or consul under his hand and seal of office, or by a judge of one of the United States courts under his hand and seal, to be true copies of the originals, the same shall be sealed up by him and returned to the solicitor of the treasury, who shall file the same in his office, and cause it to be recorded in a book kept for that purpose. Such copy may be read in evidence in all courts, where the title to land claimed by or under the United States may come into question, equally with the originals thereof.

*Miscellaneous Laws. c. 64.*Effect of foreign wills  
and probates.Law of the place when to  
govern, and when not.Copies of foreign wills,  
record of.Foreign will, how  
contested.

s. 17. Any person not an inhabitant, but owning property, real or personal, in this State may devise or bequeath such property by last will, executed and proved (if real estate be devised) according to the laws of this State, or (if personal estate be bequeathed) according to the laws of this State, or of the country, State or territory in which the will shall be proved.

s. 18. Copies of such wills, and the probate thereof, shall be recorded in the same manner as wills executed and proven in this State, and shall be admitted in evidence in the same manner and with like effect.

s. 19. Any such will may be contested and annulled within the same time, and in the same manner, as wills executed and proven in this State.

**PENNSYLVANIA.***Digest. p. 598.*SERVICE ON ABSENT  
DEFENDANTS.  
—

In actions relating to realty, or when the court has acquired jurisdiction of the subject matter in controversy by the service of its process on one or more of the principal defendants, the court

may order service out of the jurisdiction on the defendants wherever they may be found :—

**Chapter XIV.**

*Provided*, that it shall appear by affidavit before the order is made, in what place the defendant resides or may probably be found, or if it be out of the United States, whether there are any officers of the United States residing thereat or near thereto, and by what means such service may be authenticated. Affidavit.

The time is to be limited, dependent on the place where process is to be served, within which compliance with the requirements thereof must be made by the defendant. Time for appearance.

A copy of the order is to be served, and also a copy of the bill or a statement of the substance of the proceeding, and the special order for authenticating the service. If the defendant is not to be found, publication of the notice with full particulars is allowed. Publication.

## RHODE ISLAND.

### *Statutes. c. 196.*

s. 4. A writ of summons issued against an insurance company incorporated in any other State or country, which shall have an agency in this State, shall be served by leaving an attested copy of such writ with such agent, or at his last and usual place of abode. Service on foreign insurance company.

## SOUTH CAROLINA.

### *Code of Civil Procedure.*

s. 158. The cause of action arising within the State, the procedure as to constructive notice on non-resident defendants is the same as in the Indiana Code. [p. 528.]

SERVICE ON ABSENT DEFENDANTS.  
—

## TENNESSEE.

### *Code.*

s. 2783. Where the Statute of Limitations of another State or Government has created a bar to an action upon a cause accruing therein, whilst the party to be charged was a resident in such State or under such Government, the bar is equally effectual in this State. STATUTE OF LIMITATION.  
If foreign statute bars remedy, defence good.

s. 2776. Actions on home, United States or foreign judgments are barred in 10 years.

s. 2834. When a corporation, company or individual has an office or agency in any country other than that in which the prin- Service on foreign companies.

**Chapter XIV.**

cipal resides, the service of process may be made on any agent or clerk employed therein, in all actions growing out of or connected with the business of the office or agency.

PROOF OF FOREIGN  
JUDGMENTS.  
—

s. 3797. The same as New York Code of Civil Procedure, s. 952. [p. 522.]

**TEXAS.***Code.*

PROOF OF FOREIGN  
JUDGMENTS.  
—

ss: 3957. 3958. Foreign judgments are required to be under the certificates of the judge and clerk of the court, the chief of the Executive Government of the country, and the Consul of the Republic : and no suit shall be brought on a foreign judgment till an authenticated copy is filed, and all costs likely to accrue are paid, together with a tax fee of \$25 cash, payable to the clerk of the court 'for the use of this Republic.'

Charges.

EFFECT OF FOREIGN  
JUDGMENTS.  
—

s. 3959. Foreign judgments when authenticated are *primâ facie* evidence only and open to all defences that might have been used at any time before judgment.

Original defences  
allowed.

This does not apply to judgments of the United States.

[In Paschall's edition of the Code it is stated that these sections are not pursued in practice, but the Editor's own idea is that they still remain in force.]

**VERMONT.**

Actions on home or United States judgments are barred in 8 years, and on foreign judgments (presumably) in 6 years.

**VIRGINIA.***Laws. c. 149.*

If foreign statute bars  
remedy, defence good.

s. 17. An action on a foreign judgment is barred if it is barred by its own laws and the judgment incapable of being otherwise enforced there, and whether or not so barred, no actions on the judgment shall be brought after 10 years against a person who shall have resided in the State during the ten years next preceding such action.

*c. 171.*

ABSENT DEFENDANTS.  
—

s. 7. If the officer return the defendant as non-resident, the suit shall abate if the court have jurisdiction of the case only on the ground of the defendant's residence in the State.

ss: 10. 13. Publication is made in the same manner as in Indiana. [see p. 528]. The judgment may be reopened within 5 years if no copy of the judgment was served, and in one year if a copy was served.

**Chapter XIV.**

Publication of service.

*c. 176.*

s. 17. A foreign judgment is evidence in any court in the State when it has been attested by a notary public under the seal of his office that the judgment was made in due form according to the law of the place, and that the copy is true. The notary public himself is to be certified by the chief magistrate, or under the Great Seal of the country.

PROOF OF FOREIGN  
JUDGMENTS.**WISCONSIN.**

Actions on home judgments are barred in 20 years, on United States judgments in 10 years, and on foreign judgments (presumably) in 10 years.

The procedure as to constructive notice on non-resident defendants is the same as in the Indiana Code. [p. 528.]

SERVICE ON ABSENT  
DEFENDANTS.



## CHAPTER XV.

## Chapter XV.

## THE LAWS OF THE REPUBLICS OF SOUTH AMERICA.

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It has been found impossible to obtain copies of the Codes of many of the South American Republics.

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## ARGENTINE CONFEDERATION.

[including the Provinces of the RIO DE LA PLATA and EAST PATAGONIA.] [M. ASSER, R.D.I, 1873. p. 591.]

### *Civil Code. 1871.*

#### PRELIMINARY TITLE. I.

Capacity or incapacity of persons, denizens or aliens, domiciled in the Republic is decided according to this code, even if it concern deeds executed or goods situate in a foreign country : if domiciled out of the Republic, according to the law of their domicil, even if it concern deeds executed or goods situate in the Republic.

Capacity of persons domiciled within Republic.

Documents signed, contracts entered into and rights acquired in a foreign country are governed by the rules of that country :— but they cannot receive effect as regards immoveables in the Republic if they are not conformable to the laws of the country as to personal capacity.

Foreign contracts

relating to immoveables in the Republic.

Parties interested are to prove the existence of foreign laws.

Foreign laws are not applicable when they are antagonistic to the public or criminal law of the Republic, to the religion of the State, to the toleration of worship or to good manners :—when their application is contrary to the spirit of the Code : when they sanction first charges (*des privilèges*) : or when the provisions of this Code are more favourable to the validity of the documents than the foreign laws.

Effect of foreign laws.

### *Title I.*

s. 2. The validity of a marriage (not incestuous nor polygamous) is governed by the law of the place where it was celebrated, even if the parties went abroad in order to evade their own laws.

Validity of foreign marriage.

[Divorce does not exist in the Republic.]

s. 3. Contracts entered into abroad are governed by the *lex loci contractus*, unless contrary to the rights and interests of the Republic and its inhabitants.

Foreign contracts.

Contracts entered into abroad to violate the laws of the Republic, or those entered into in the Republic to violate the laws of another State, are invalid.

**Chapter XV.**

Contracts entered into in the Republic to be executed elsewhere are governed by the laws and customs of the place of execution. Contracts entered into abroad to transfer real rights over immovables situate in the Republic, have the same force as those entered into in this country, provided they have been made by deed authenticated and duly legalised. Contracts entered into between absent parties shall be interpreted on behalf of either of the parties to it according to the law of his domicile.

*Title VI.*

Election of domicile in agreement.

s. 13. Persons in entering into agreements may elect a special domicile for the fulfilment of the same.

s. 14. The election of a domicile carries with it the extension of the jurisdiction, which would not otherwise extend to the judges of the place of residence of the parties.

**BOLIVIA.***Civil Code. 1830.*

s. 7. Foreigners in Bolivia shall enjoy the same civil rights as those which are or may be granted to Bolivians by treaties, or which may arise therefrom.

Judicial hypothec.

s. 1458. The same as Code Napoléon, s. 2123. [p. 449].

Treaty.

There is a treaty with Peru, 5 November 1863, for the mutual enforcement of the judgments of the two Republics.

s. 4. Both contracting parties being desirous of drawing the civil relations of their respective citizens closer, and of establishing between them an intimate union for the common good, declare that the decisions in civil matters issued by the tribunals and courts of the one shall be fulfilled by those of the other, and consequently that the final sentences in civil matters having the force of *res judicata*, delivered by the Peruvian tribunals shall be executed in Bolivia, and reciprocally those of Bolivia in Peru, provided that the said decisions or sentences be not in opposition, either in regard to matters or persons, to the constitutions or the laws of the country that has to execute them, and that they be duly legalised.

The execution can be effected at the request of the parties, or in virtue of rogatory commissions from the respective authorities.

s. 9. The subjects of the two countries respectively are to have a free and easy access to the courts of justice, and to enjoy the same rights and advantages accorded to subjects.

[This has been held to include an exemption from finding security for costs.]

## BRAZIL.

*Law. 27 July, 1878.*

[*Regula a execução das sentenças cíveis ou commerciaes, dos tribunacs estrangeiros.*] [A. L. E. 1873, pp: 736-747.]

s. 1. Foreign judgments in civil or commercial matters shall be capable of execution in Brazil only when they fulfil the following conditions :—

EFFECT OF FOREIGN  
JUDGMENTS.  
—

a. That the nation to which the judges or tribunals belong who have pronounced the judgment admits the principle of reciprocity [repealed, see below, p. 546].

b. That such judgments come before the courts clothed with the extrinsic formalities necessary to render them executory according to the law of the foreign State.

c. That they have the force of *res judicata*.

d. That they have been duly legalised by the Brazilian consul.

e. That they are accompanied by a translation made by a sworn interpreter.

s. 2. Notwithstanding the fulfilment of the above conditions, such judgments shall not be executed if they contain any principle contrary to,

a. The sovereignty of the nation, as for example if they have withdrawn a Brazilian subject from the jurisdiction of the tribunals of the Empire.

b. Laws which are rigorously obligatory being founded on reasons of public order, such as rules which forbid the institution of the Church (*Pâme*) or religious bodies as heirs.

c. Laws which affect real property such as those which forbid the creation of entails (*majorats*) or perpetuities.

d. The moral law; for example if the foreign judgment has authorised polygamy or customs contrary to public morality.

s. 3. Those Brazilian judges are competent to allow execution who would be so competent had the judgment been pronounced by judges or tribunals of the Empire.

s. 4. The judge to whom the judgment is presented for the purpose of obtaining execution shall see whether it fulfils the conditions of s. 1, or whether not being contrary to the provisions of s. 2 it is capable of execution.

a. If he finds the judgment is capable of execution he will endorse it with the necessary order (*cumpra se*).

b. Against an order refusing the *exequatur* an appeal is allowed (*aggravo de petição ou de instrumento*).

## Chapter XV.

s. 5. If doubts arise as to the existence of principles of reciprocity, the judge shall ask the government through the medium of the Minister of Justice for instructions upon this point.

s. 6. The procedure as to execution, and its different processes and incidents, is to be regulated by the laws, customs, and practice in force in the Empire relating to the execution of Brazilian judgments of a similar nature.

s. 7. But the interpretation of the judgment and its immediate effects shall be determined by the law of the country where the judgment was given.

Defences.

s. 8. During the six days following the distraint (*saisie*) in personal actions, or during the ten days allowed to redeem the *res* in real actions, the party against whom execution has issued may plead exceptions (*embargos*) to the judgment,

i. Founded on ss: 1 & 2.

ii. Of nullity [*de nullidade*]: (that the judgment is null and void).

iii. Offensive [*infringentes*, *i.e.* against the authority of the *res judicata*].

a. If the exceptions so pleaded are sustained, the judge in setting forth the reason in fact and in law, shall simply state that the judgment is not executory.

b. From the order by which the judgment is declared not executory, an appeal is allowed, which shall have the usual two-fold effect (*dévolutif et suspensif*).

Suit on same cause of action.

s. 9. When the judgment has been declared not executory, all the papers, pleadings, documents and other proofs which have been made use of to establish it may be produced in actions initiated in the Empire for the same object, and shall be received according to their legal value.

Judgments in partition suits.

s. 10. Foreign judgments in partition suits must be invested with the *exequatur* [s. 4] before they can be received administratively as carrying legal effect.

of status.

s. 11. Judgments which are simply declaratory, such as those which decide questions of status must also be invested with the *exequatur*.

Force of judgment without *exequatur*.

s. 12. Although a foreign judgment may not have been invested with the *exequatur*, yet it shall always have the force of *res judicata* before the tribunals of the Empire, if it fulfil the conditions of s. 1 and do not involve any principle contrary to the provisions of s. 2.

Awards.

s. 13. Subject to the provisions of this decree, awards confirmed by foreign tribunals shall also be executory in Brazil.



## Chapter XV.

s. 14. And similarly foreign adjudications in bankruptcy against traders having their domicile in the country where these judgments have been pronounced.

Adjudications in bankruptcy.

s. 15. The above judgments, after having received the *exequatur* from the Brazilian judges [ss: 1 and 2] and after the publication of this *exequatur*, shall produce in the Empire the legal effects inherent to adjudications in bankruptcy subject to the restrictions set out in ss: 17-20.

s. 16. Independently of the *exequatur*, and simply on production of the judgment and of the deed nominating them in a properly authenticated form, the syndics, administrators, or trustees shall have the power in virtue of their office to institute (*provoquer*) in the Empire as mandatories, measures for the preservation of the rights of the creditors (*droits de la masse*), to recover debts, to compromise (*transiger*) claims if they have power to do so, and to initiate actions.

Power of trustees when *exequatur* not needed.

But all actions which may directly necessitate the execution of the judgment, such as seizure and sale of the debtor's goods, can only be performed after the judgment has been made executory by means of the *exequatur*, and with the authority of the Brazilian judge, the formalities required by the national laws being observed.

When *exequatur* needed.

s. 17. Although the foreign adjudication in bankruptcy has been made executory, creditors domiciled in Brazil, who may have a lien over immoveables situated there belonging to the bankrupt, may sue for payment of their debts and appropriate the said immoveables.

Brazilian creditors.

s. 18. The provisions of the preceding section apply to creditors on a promissory note (*chirographaires*) in a like manner domiciled in Brazil who have commenced actions against the debtor prior to the granting of the *exequatur*. They shall be allowed to continue their actions and appropriate the bankrupt's goods situate or being within the Empire.

s. 19. The foreign adjudication of bankruptcy against a trader having two places of business—one in the country of his domicile and the other, distinct and separate, in Brazil—shall not include in its effect the Brazilian place of business. The bankruptcy of this establishment can be declared only by the Brazilian authorities; and the creditors of this establishment shall be paid out of its own assets in preference to the creditors of the foreign establishment.

Trader with two places of business.

s. 20. Mutual agreements for delay or otherwise (*concordats et sursis: moratoria*) confirmed by foreign tribunals, shall only be

## Chapter XV.

binding on creditors resident in Brazil when they have been summoned to join in them, and after the *exequatur* has been given.

s. 21. It is understood that foreign adjudications in bankruptcy pronounced against traders domiciled in the Empire [s. 2 a] are not capable of execution in Brazil.

Treaty.

s. 22. Where a treaty or convention has been entered into with any foreign nation, relating to the execution of judgments, the stipulations therein contained shall be observed.

s. 23. All provisions contrary to the present regulation are repealed.

[A. L. E. 1881, p. 784].

*Decree. 27 July, 1880.*

[*Regula a execucao das sentenças estrangeiras na falta de reciprocidade.*]

Reciprocity as to  
execution of foreign  
judgments abolished.

Judgments from countries where reciprocity is not established may receive execution by means of the *placet* of the Government, which will be accorded according to the circumstances of the case.

The forms of execution in this case are to be those provided by the decree of 1878.

*Commercial Code.*

[Spence's translation.]

s. 30. All commercial transactions entered into by foreigners resident in Brazil, shall be regulated and decided by the provisions of this Code.

The Tribunal of Commerce of Rio has decided, that the courts have no jurisdiction under this section over a foreigner who is not domiciled in the Empire in respect of contracts entered into in a foreign country, but not enforceable in the Empire by reason of their not having been entered into with Brazilians.

Security for costs.

Security for costs is required from foreigners even if they possess goods in the country, and even from a non-resident merchant although he may have a commercial domicile in the country: if the security is not given, or if it be given insufficiently, within the period prescribed, the foreigner is shut out from the suit: if on the other hand he has a counterclaim, he may require security from the other party: but it is not required when the action is brought for the enforcement of a secured title (*titre paré*). (*Lemos v. Roulina*. J.D.I.P. 1880, p. 515.)

Treaties.

There is a convention with Uruguay, 14 February, 1879, with regard to the reciprocal execution of rogatory commissions in civil and criminal matters [see p. 548], and also a convention with Italy,

27 May, 1880, for the reciprocal execution of judgments relating to hereditary rights and wills.

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## CHILI.

*Civil Code 1855 [republished 1865].*

s. 57. The law does not recognise any difference between Chilians and foreigners with respect to the acquisition and enjoyment of the civil rights prescribed in this Code.

## MEXICO.

[including LOWER CALIFORNIA.]

The Civil Code of Mexico is the same as that of Spain [see page 499]. A Code of Civil Procedure was promulgated 15 August 1872 based upon the new Spanish Code.

Security for costs is required from foreigners.

Security for costs.

## PERU.

*Civil Code.*

P. PRADIER FODÉRÉ  
J. D. I. P. 1879.  
pp: 41, 250.

PRELIMINARY TITLE. V.

Foreign judgments relating to immoveables in Peru will not be made executory.

s. 37. Peruvians and strangers domiciled in Peru, wherever they may be found, may be cited to appear before the Peruvian courts for causes of action arising out of contracts entered into even in foreign countries with respect to matters on which Peruvian law allows contracts.

SERVICE ON ABSENT  
DEFENDANTS.

in what cases.

s. 38. Foreigners found in Peru, though not domiciled, may be sued on contracts made with Peruvians even abroad with respect to matters not forbidden by Peruvian law.

Foreigners not domiciled.

[Prohibited Contracts *cf.* ss: 1252—5, 1279.]

The action under section 38 once begun, residence by the defendant is not necessary if a proper attorney has been instructed, or security for costs given under sections 573—4 of the Code of Civil Procedure.

s. 39. Domiciled or non-domiciled foreigners may be cited,

Foreigners domiciled.

i. in real actions concerning immoveables in Peru.

ii. in civil actions for a fault or wrong committed in Peru.

iii. on contracts with agreed submission to the Peruvian courts.

s. 43. Actions may not be brought on contracts entered into abroad between foreigners unless the contracting parties have submitted to the Peruvian tribunals.

## Chapter XV.

Treaty.

There is a treaty with Bolivia, 5 November 1863, for the mutual enforcement of the judgments of the two Republics [set out on page 542].

There appears to be some doubt whether a treaty with the foreign country is not a condition precedent to giving executory force to its judgments :—

The rogatory commission is as follows :

Form of rogatory commission.

It is to be addressed to the legation accredited by the foreign State to Peru.

Thence it is to be sent to the Minister of Foreign Affairs : thence to the judge who is asked to give the judgment executory force.

The same formalities are pursued in returning the papers.

It is to be on stamped paper, sealed by the foreign court sending it, signed by the president of the court, and certified by the secretary of the court, or the counsel engaged.

The formula is :—‘ Au nom de la nation, la cour de — (or ‘ le juge de — )’ : then follows a résumé of the questions ‘ qu’on ‘ donne à la commission ’—also copies of all papers. Finally the prayer ‘ qu’on accomplisse.’

## URUGUAY.

The Civil Code [1867] resembles the Chilian Code. [see p. 547.]

There is a convention with Brazil, 14 Feb: 1879, concerning the execution of rogatory commissions in civil and criminal matters.

Rogatory commissions relating to interlocutory judgments and examinations (*actes d'instruction*) are to be entertained by the courts when they are transmitted *par voie diplomatique* : they are to be executed by a simple *pareatis* of the judicial authority, but subject to exceptions and appeal.

## VENEZUELA.

*Civil Code.*

s. 17. Foreigners enjoy in Venezuela the same civil rights as the Venezuelans, with such exceptions as may be in existence or may be made hereafter.

s. 1818. The same as Code Napoléon, s. 2123. [p. 449.]

*Code of Civil Procedure [1873].*

## EXECUTION OF ACTS DONE BY FOREIGN AUTHORITIES.

s. 551. It is within the jurisdiction of the supreme federal court to grant executory force to judgments given by foreign authorities.

s. 552. In order that a judgment pronounced by a foreign tribunal may have force and effect in the Republic, it is necessary,

- i. that the sentence or judgment should not affect immoveable property in Venezuela :
- ii. that the judgment be granted by a competent judicial authority :
- iii. that the judgment be granted after the parties interested were duly summoned :
- iv. that the agreement for the fulfilment of which the proceedings were instituted be lawful in Venezuela, and that the judgment do not contain any resolution contrary to public order or public rights according to the internal laws of Venezuela.

Defences.

s. 553. In order that the judgment may be made executory it is necessary that the party against whom it has been given shall be summoned ten days previous to the hearing, and that the party or parties be permitted to reply verbally in public sitting whatever they may consider it necessary to say in defence of their claims or rights.

Procedure.

The party who promotes the suit shall present the judgment in an authenticated form.

s. 554. The dispositions made by foreign tribunals respecting the examination of witnesses, estimates, affidavits, interrogatories and other *actes d'instruction* simply that may have to be carried into effect in the Republic, shall be done in pursuance of a decree by the judge of the court of first instance having jurisdiction in the locality wherein such acts are to be carried into effect.

Execution of interlocutory decrees.

s. 555. The rules laid down in the preceding article are applicable also to a summons or writ that may be issued against any person residing in the Republic, to appear before foreign authorities, and also to the notification of documents coming from a foreign country.

Leave to serve writ issued by foreign jurisdiction.

s. 556. The provisions of this title are subordinate to those laid down in international treaties and conventions and to those prescribed by special laws.



## CHAPTER XVI.

## Chapter XVI.

## THE LAWS IN FORCE IN AFRICA.

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[A. DELOS.]

**EGYPT.***Civil Code.*

s. 13. All subjects resident in the country may be cited before the tribunals of the country for obligations contracted by them even abroad.

SERVICE ON ABSENT  
DEFENDANTS.

s. 14. The same applies to foreigners resident in the country. A foreigner who has left the country can only be cited before the tribunals in the following cases :—

- i. With respect to obligations relating to moveables or immoveables existing in the country.
- ii. With respect to obligations arising out of contracts agreed or of necessity to be executed in the country, or with respect to acts which may have been accomplished there :

Without prejudice to the competence of the tribunals of commerce in the cases settled by law, and whatever be the residence of the defendant.

A foreigner may be cited before the Egyptian tribunals with respect to obligations contracted abroad if he is within the jurisdiction, but he need not be domiciled there : it is sufficient that the plaintiff be domiciled there, but he need not be a subject nor even reside in the country. (*Carab v. Ahmet Buharali*. J.D.I.P. 1878, p. 178.)

Judicial hypothec.

s. 682. Judicial hypothec results from judgments : [there is no mention of foreign judgments as in the Code Napoléon, s. 2123].

*Code of Civil Procedure.***Chapter XVI.**

s. 35. The Egyptian tribunals have jurisdiction in respect of Jurisdiction of the court. immoveables situate in the country : companies, (by the tribunal of the place where their branch office is situate) : bankruptcy in the country : elected domicile by reason of a contract to be executed in the country : cases of guarantee : reconvention, or counterclaim against a plaintiff who has availed himself of the Egyptian courts : by reason of contracts entered into in the country : and in cases of succession to property in the country.

(9.) When the defendant is domiciled abroad, and when no Egyptian tribunal has jurisdiction under the preceding paragraph, the writ may be served at the place of the defendant's residence, or in default may be posted in the court at Alexandria.

**LIBERIA.***Laws and Treaties. Vol : 6. Chap : xi [1857].*

s. 10. The judgments of foreign courts and foreign records and the written laws of other countries must be proved by copies attested in the most solemn manner usual in such countries : and proof must be given as to what is the most solemn manner used in such countries.

PROOF OF FOREIGN  
JUDGMENTS.  
—

s. 16. A foreign judgment is evidence in the same manner as a domestic one, its existence having been first proved, and also the existence of the law upon which it is founded. But no proof need be given of the law of nations.

EFFECT OF FOREIGN  
JUDGMENTS.  
—

s. 17. A judgment of a foreign prize court is not conclusive evidence of any act whatever, but it is some evidence.

s. 18. A foreign judgment in a case in which the defendant did Judgment by default. not appear, although a party thereto, shall be no evidence against him. But if any person have appeared for his interest, it shall be evidence, unless he show that the appearance was without his authority.

s. 22. In all cases where the judgment of a foreign court is relied on in evidence, the jurisdiction of such court must be proved to extend to the case in which the judgment was given.



## APPENDIX.

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### *THE JUDGMENTS EXTENSION ACT, 1868.*

31 & 32 Victoria, Chapter 54.

An Act to render Judgments or Decrees obtained in certain Courts in England, Scotland, and Ireland respectively, effectual in any other part of the United Kingdom.

[13th July, 1868.]

BE it enacted as follows :

1. Where Judgment shall hereafter be obtained or entered up in any of the Courts of Queen's Bench, Common Pleas, or Exchequer at Westminster or Dublin respectively, for any debt, damages, or costs, on production to the Master of the Court of Common Pleas at Dublin, where such judgment shall have been obtained or entered up in any of the said courts in England, or to the Senior Master of the Court of Common Pleas at Westminster, where such judgment shall have been obtained or entered up in any of the said courts in Ireland, of a certificate of such judgment in one of the forms contained in the schedule hereto annexed, as the case may be, purporting to be signed by the proper officer of the court where such judgment has been obtained or entered up, such certificate shall be registered by such master in a register to be kept in the Court of Common Pleas at Dublin and at Westminster respectively for that purpose, and to be called in the Court of Common Pleas at Dublin, 'The Register for English Judgments,' and to be called in the Court of Common Pleas at Westminster, 'The Register for Irish Judgments,' and shall from the date of such registration be of the same force and effect, and all proceedings shall and may be had and taken on such certificate as if the judgment of which it is a certificate had been a judgment originally obtained or entered up on the date of such registration as aforesaid in the court in which it is so registered, and all the reasonable costs and charges attendant upon the obtaining and registering such certificate shall be recovered in like manner as if the same were part of the original judgment : provided always, that no certificate of any such judgment shall be registered as aforesaid more than twelve months

Where judgment has been obtained in the courts at Westminster a certificate thereof registered in Ireland and *vice versa* shall have the effect of a judgment of the court in which it is so registered.

31 & 32 V.  
c. 54.

Where judgment has been obtained in the courts at Westminster or at Dublin, a certificate thereof registered in Scotland shall have the effect of a decret of the Court of Session.

after the date of such judgment, unless application shall have been first made to, and leave obtained from, the court or a judge of the court in which it is sought so to register such certificate.

2. Where judgment shall hereafter be obtained or entered up in any of the Courts of Queen's Bench, Common Pleas, or Exchequer at Westminster or Dublin respectively for any debt, damages, or costs, on production at the office kept in Edinburgh for the registration of deeds, bonds, protests, and other writs registered in the books of council and session of a certificate of such judgment in one of the forms contained in the schedule hereto annexed, as the case may be, purporting to be signed by the proper officer of the court where such judgment has been obtained or entered up, such certificate shall be registered in a book to be kept for that purpose, and to be called, 'The Register for English and Irish Judgments,' in like manner as a bond executed according to the law of Scotland with a clause of registration for execution therein contained; and every certificate so registered shall, from the date of such registration, be of the same force and effect as a decret of the Court of Session, and all proceedings shall and may be had and taken on an extract of such certificate, as if the judgment of which it is a certificate had been a decret originally pronounced in a Court of Session on the date of such registration as aforesaid, and all the reasonable costs, charges, and expenses attendant upon the obtaining and registering such certificate shall be recovered in like manner as if the same were part of the original judgment: provided always, that no certificate of any such judgment shall be registered as aforesaid more than twelve months after the date of such judgment, unless application shall have first been made to, and leave obtained from, the Lord Ordinary on the bills.

Where decret has been obtained in the Court of Session, a certificate of an extract thereof registered in England or Ireland shall have the effect of a judgment of the court in which it is so registered.

3. On production to the senior master of the Court of Common Pleas at Westminster, or to the master of the Court of Common Pleas at Dublin, of the certificate in one of the forms contained in the schedule hereto annexed, as the case may be, of any extracted decret of the Court of Session in Scotland which shall hereafter be obtained for the payment of any debt, damages, or expenses, purporting to be signed by the extractor of the Court of Session or other officer duly authorised to make and subscribe extracts, or on production of the certificate of an extracted decret of registration in the book of council and session purporting to be signed by the keeper of the register of deeds, bonds, protests, and other writs registered for execution in the books of council and session, which shall hereafter be obtained for the payment of any debt, damages or expenses, such certificate shall be registered by such master in a register to be kept in the Courts of Common Pleas at Westminster and Dublin respectively for that purpose, and to be called 'The Register for Scotch Judgments,' and such certificate when so registered shall, from the date of such registration, be of the same force and effect as a judgment obtained or entered up in the court in which it is so registered, and all proceedings shall and may be had and taken on such certificate as if the decret of which it is a certificate had been a judgment originally obtained or entered up



on the date of such registration as aforesaid in the court in which it is so registered, and all the reasonable costs, charges, and expenses attendant upon the obtaining and registering such certificate shall be recovered in like manner as if the same were part of the decret of which it is a certificate ; provided always, that no certificate shall be registered as aforesaid more than twelve months after the date of such decret, unless application shall have been first made to, and leave obtained from, the court or a judge of the court in which it is sought so to register such certificate : provided that, where a note of suspension of any such decret shall have been passed, or a sist of execution shall have been granted thereon by the said court of session or any judge thereof on the production of a certificate under the hand of the clerk to the bill chamber of the Court of Session of the passing of such note or the granting of such sist to a judge of the court in which such certificate of such decret has been registered, execution on such registered certificate shall be stayed until a certificate be produced under the hand of the said clerk that such sist has been recalled or has expired, or where the note of suspension has been passed, until there be produced an extract under the hand of the extractor of the court of session or other officer duly authorised to make and subscribe extracts, of a decret of the said court repelling the reasons of suspension.

31 & 32 V.  
C. 54.

4. The Courts of Common Pleas at Westminster and at Dublin and the Court of Session in Scotland shall have and exercise the same control and jurisdiction over any judgment or decret, and over any certificate of such judgment or decret, registered under this Act in such courts respectively as they now have and exercise over any judgment or decret in their own courts, but in so far only as relates to execution under this Act.

Control of  
courts over  
registered  
judgments.

5. It shall not be necessary for any plaintiff in any of the aforesaid courts in England resident in Ireland or Scotland, or any plaintiff in any of the aforesaid courts in Ireland resident in England or Scotland, in any proceeding had and taken on such certificate, to find security for costs in respect of such residence, unless, on special grounds, a judge or the court shall otherwise order, nor shall it be necessary for any party to such proceeding in Scotland resident in England or Ireland to sist a mandatory, or otherwise to find security for expenses in respect of such residence, unless, on special grounds, the court shall otherwise order.

No security  
for costs  
where  
plaintiff  
resides in a  
different  
part of the  
kingdom.

6. In any action brought in any court in England, Scotland, or Ireland on any judgment or decret which might be registered under this Act in the country in which such action is brought, the party bringing such action shall not recover or be entitled to any costs or expenses of suit unless the court in which such action shall be brought, or some judge of the same court, shall otherwise order.

Costs not to  
be allowed  
in actions on  
judgments  
unless by  
order of  
court.

7. It shall be lawful for the judges of the Courts of Queen's Bench, Common Pleas, and Exchequer at Westminster and Dublin respectively, or any eight or more of them respectively, of whom the chiefs of the said courts respectively shall be three, and they are hereby required, from time to time to make all such general rules and orders to

Judges to  
make rules  
for execution  
of this Act.

31 & 32 V.  
c. 54.

regulate the practice to be observed in the execution of this Act, or in any matter relating thereto, including the scale of fees to be charged in the courts of common law in England and Ireland respectively, as they may deem to be necessary and proper; and it shall be lawful for the Court of Session in Scotland, and the said court is hereby required, from time to time to make such acts of sederunt to regulate the practice to be observed in the execution of the Act, or in any matter relating thereto, including the scale of fees to be charged in Scotland, as such court may deem to be necessary and proper: provided always, that such rules, orders, and acts of sederunt respectively shall be laid before both Houses of Parliament within one month from the making thereof if Parliament be then sitting, or if Parliament be not then sitting, within one month from the commencement of the then next session of Parliament.

Acts not to  
apply to  
certain  
decreets.

8. This Act shall not apply to any decret pronounced in absence in an action proceeding on an arrestment used to found jurisdiction in Scotland.

Short title.

9. In citing this Act in any instrument, document, or proceeding it shall be sufficient to use the expression 'The Judgments Extension Act, 1868.'

## SCHEDULE.

CERTIFICATE issued in terms of 'The Judgments Extension Act, 1868.'

FORM I.—Where Party applying is Plaintiff or Pursuer.

I, \_\_\_\_\_, certify that [*here state name, title, trade, or profession, and usual or last known place of abode of Plaintiff or Pursuer*] on the \_\_\_\_\_ day of \_\_\_\_\_ 18\_\_\_\_, obtained judgment against [*here state name and title, trade or profession, and usual or last known place of abode of Defendant*] before the court of \_\_\_\_\_ for payment of the sum of \_\_\_\_\_ on account of [*state shortly nature of claim or ground of action, with the sum of costs, if any, and in case of a judgment obtained in an action state whether it was obtained after appearance made by the defendant or after service (personal or otherwise) of the action on the defendant, as the case may be*].

[*Signed by the proper officer of the court from which the certificate issues.*]

FORM II.—Where Party applying is Defendant or Defender.

I, \_\_\_\_\_, certify that [*here state name, title, trade, or profession, and usual or last known place of abode of Defendant or Defender*] on the \_\_\_\_\_ day of \_\_\_\_\_ 18\_\_\_\_, obtained judgment against [*state name, title, trade, or profession, and usual or last known place of abode of Plaintiff or Pursuer*] before the court of \_\_\_\_\_ for judgment of the sum of £ \_\_\_\_\_ as costs of suit.

[*Signed by the proper officer of the court from which the certificate issues.*]

MINUTE of PRESENTATION to be appended to either Form.

Presented for registration in terms of 'The Judgments Extension Act, 1868.'

[*Signature of (attorney, law agent, or creditor) presenting for registration.*]

*THE INFERIOR COURTS JUDGMENTS EXTENSION ACT, 1882.*

45 &amp; 46 Victoria, Chapter 31.

An Act to render Judgments obtained in certain Inferior Courts in England, Scotland, and Ireland respectively, effectual in any other part of the United Kingdom.

[24th July, 1882.]

WHEREAS it is expedient to extend the principle of the 'Judgments <sup>[31 & 32 Vic: c. 54.]</sup> Extension Act, 1868,' to the judgments of certain inferior courts of Great Britain and Ireland :

Be it therefore enacted as follows :

1. This Act may be cited for all purposes as the 'Inferior Courts Short title. Judgments Extension Act, 1882.'

2. In this Act the following words and expressions shall have the Interpreta-  
tion of terms. interpretations and meanings in this section assigned to them respectively, unless there be something in the subject or context repugnant to such construction ; (that is to say,)

The expression 'judgment' shall include decret, civil bill decret, dismiss, or order :

The expression 'inferior courts' shall include County Courts, Civil Bill Courts, and all Courts in England and Ireland having jurisdiction to hear and determine civil causes, other than the High Courts of Justice ; and in Ireland, Courts of Petty Sessions and the Court of Bankruptcy ; and in Scotland shall include the Sheriffs' Courts and the Courts held under the Small Debts and Debts Recovery Acts :

The expression 'registrar of an inferior court' shall include the sheriff clerk of a Sheriff's Court in Scotland, and any officer fulfilling the duties of a registrar in an inferior court in England ; and in Ireland shall include the clerk of the peace or other officer whose duty it is to enter the judgment, decret, or order of the court :

'Prescribed' means prescribed by rules made under the provisions of this Act :

The expression 'person' shall include any party or parties to a cause in any inferior court in England, Scotland, or Ireland :

The expression 'plaintiff' shall include pursuer, complainer, or any person at whose instance any action or proceeding in an inferior court is instituted ; and the expression 'defendant' shall include defender, respondent, or other person against whom any such action or proceeding is directed :

The expression 'action' shall mean the action or other proceeding in which any judgment was pronounced ; and the expression 'summons' shall mean the summons or other initial writ in such action.

3. Where judgment shall hereafter be obtained or entered up in any of the inferior courts of England, Scotland, or Ireland respectively for any debt, damages, or costs, the registrar of such inferior court or Registrar of  
inferior  
court to  
grant certi-  
ficate of  
judgment.

45 & 46 V.  
c. 31.

Registration of certificate shall have the effect of a judgment of the court in which it is registered.

Execution of judgments.

Jurisdiction over registered judgments limited to execution.

Cancellation of registry.

Costs not to be allowed in actions on judgments unless by order of court.

other proper officer shall, after the time for appealing against such judgment shall have elapsed, and in the event of such judgment not being reversed upon appeal or of execution thereunder not being stayed, upon the application of the party who has recovered such judgment, and upon proof that the same has not been satisfied, and payment of the prescribed fee, grant a certificate in the form in the schedule to this Act annexed.

4. On the production to the registrar or other proper officer of a county court, or, in the City of London, of the City of London Court in England where a judgment has been obtained in Scotland or Ireland, or to the registrar or other proper officer of a Sheriff's Court in Scotland where a judgment has been obtained in England or Ireland, or to the registrar or other proper officer of a Civil Bill Court in Ireland where a judgment has been obtained in England or Scotland of a certificate under this Act purporting to be signed by the registrar or other proper officer of the inferior court where such judgment was obtained, such certificate shall, on payment of the prescribed fee, be registered in the prescribed form by such registrar or other proper officer to whom the same shall be produced for that purpose; and all reasonable costs and charges attendant upon the obtaining and registering such certificate shall be added to and recovered in like manner as if the same were part of the original judgment. No certificate of any such judgment shall be registered as aforesaid in any inferior court in the United Kingdom more than twelve months after the date of such judgment.

5. Where a certificate of a judgment of any of the inferior courts aforesaid has been registered under this Act, process of execution may issue thereon out of the Court in which the same shall have been so registered against any goods or chattels of the person against whom such judgment shall have been obtained, which are within the jurisdiction of such last-mentioned Court, in the same or the like manner as if the judgment to be executed had been obtained in the Court in which such certificate shall be so registered as aforesaid.

6. The courts of Great Britain and Ireland to which this Act applies shall, in so far as relates to execution under this Act, have and exercise the same control and jurisdiction over and with respect to the execution of any judgment, a certificate of which shall be registered under this Act, as they now have and exercise over and with respect to the execution of any judgment in their own courts.

7. On proof of the setting aside, or satisfaction, of any judgment of which a certificate shall have been registered under this Act, the Court in which such certificate is so registered may order the registration thereof to be cancelled.

8. In any action brought in any of the inferior courts aforesaid for the purpose of enforcing any judgment which might be registered under this Act in the country in which such action is brought, the party bringing such action shall not recover or be entitled to any costs or expenses, unless the Court in which such action shall be brought shall otherwise order.

9. Nothing contained in this Act shall authorise the registration in an inferior court of the certificate of any judgment for a greater amount than might have been recovered if the action or proceeding had been originally commenced in such inferior court.

45 & 46 V.  
c. 31.

Existing  
limits of  
local juris-  
diction shall  
not be  
exceeded.

Provided that where a judgment obtained in an inferior court in Scotland cannot be registered in an inferior court in England or Ireland, by reason of its being for a greater amount than might have been recovered if the action or proceeding had been originally commenced in such inferior court, it shall be competent to register a certificate of such judgment in the register directed to be kept in the Courts of Common Pleas at Westminster and Dublin respectively, to be called 'The Register of Scotch Judgments,' by section three of the Judgments Extension Act, 1868, in the same manner, to the same effect, and subject to the same provisions, as if the said certificate had been a certificate of an extracted decret of the Court of Session, registered in the said register under the said Act.

10. This Act shall not apply to any judgment pronounced by any inferior court in England against any person domiciled in Scotland or Ireland at the time of the commencement of any action, unless the whole cause of action shall have arisen, or the obligation to which the judgment relates ought to have been fulfilled, within the district of such inferior court, and the summons was served upon the defendant personally within the said district, nor to any judgment pronounced by any inferior court in Scotland against any person domiciled in England or Ireland at the time of the commencement of any action, unless the whole cause of action shall have arisen, or the obligation to which the judgment relates ought to have been fulfilled, within the district of such inferior court, and the summons was served upon the defendant personally within the said district, nor to any judgment pronounced by any inferior court in Ireland against any person domiciled in England or Scotland at the time of the commencement of any action, unless the whole cause of action shall have arisen, or the obligation to which the judgment relates ought to have been fulfilled, within the district of such inferior court, and the summons was served upon the defendant personally within the said district.

Act not to  
apply in cer-  
tain cases.

Provided that it shall be competent to any person against whom any judgment to which this Act does not apply, as aforesaid, is sought to be enforced by registration in the register of an inferior court in England or Ireland, to apply for and obtain from one of the superior courts of England or Ireland, a prohibition or injunction against the enforcement of such judgment, and of any execution thereupon: and that it shall be competent to any person against whom any judgment to which this Act does not apply, as aforesaid, is sought to be enforced by registration in the register of an inferior court in Scotland, to apply for and obtain from the Bill Chamber or Court of Session in Scotland suspension or suspension and interdict of or against the enforcement of such judgment and any diligence thereon, and in any such proceeding as aforesaid the unsuccessful party may be found liable in costs.



45 & 46 V.  
c. 31.  
Rules.

11. Rules for the purpose of this Act may be made and altered from time to time by the like persons and in the like manner in which rules and regulations may be respectively made under and for the purposes of the County Courts Acts in England ; of the Sheriffs' Courts Acts in Scotland, and of the Civil Bill Courts Acts in Ireland ; provided that the said rules and regulations shall not extend the jurisdiction of any inferior court.

#### SCHEDULE.

CERTIFICATE issued in terms of the ' Inferior Courts Judgments Extension Act, 1882.'

I, \_\_\_\_\_, certify that [*here state name, business, or occupation, and address of person obtaining judgment, and whether Plaintiff or Defendant*] on the \_\_\_\_\_ day of \_\_\_\_\_ 18\_\_\_\_, obtained judgment against [*here state name, business, or occupation and address of person against whom judgment was obtained, and whether Plaintiff or Defendant*] in the \_\_\_\_\_ Court of \_\_\_\_\_ for payment of the sum of \_\_\_\_\_ on account of [*here state shortly the nature of the claim with the amount of costs (if any) for which judgment was obtained*].  
[*To be signed by the Registrar or other proper Officer of the Inferior Court from which the certificate issues, and to be sealed with the Seal of the Court.*]

NOTE of PRESENTATION to be appended to above Form.

The above certificate is presented by me for registration in the \_\_\_\_\_ Court of \_\_\_\_\_, in accordance with the provisions of the ' Inferior Courts Judgments Extension Act, 1882.'

[*Signature and address of Solicitor, Law Agent, or Creditor presenting for Registration.*]

#### *The Foreign Probate Act, 1879, of Western Australia. No. 5 of 1879.*

An Act to give effect in Western Australia to Probates and Letters of Administration granted in any other part of Her Majesty's Dominions. [Assented to, 8th August, 1879.]

Preamble. WHEREAS it is expedient to give to probates and letters of administration granted in any other part of Her Majesty's Dominions the like force and effect as if originally granted in Western Australia, upon the same being resealed :

Be it therefore enacted as follows :—

Interpreta-  
tion. 1. In the construction and for the purpose of this Act, and of all proceedings thereunder, the following terms shall have the respective meanings hereafter assigned to them, except where there is something in the context repugnant to such construction, that is to say—

‘ Probate ’ shall include ‘ Exemplification of Probate.’

Probate.

‘ Letters of Administration ’ shall include ‘ Exemplification of Letters of Administration.’

Letters of administration.  
Probates and administrations granted elsewhere to be of like force as if granted in Western Australia on being re-sealed.

2. From and after the period at which this Act shall come into operation, when any probate or letters of administration granted by a court of competent jurisdiction in any part of Her Majesty’s Dominions shall be produced to, and a copy thereof deposited with, the Registrar of the Supreme Court of Western Australia, such probate or letter of administration shall be sealed with the seal of the last mentioned Court, and shall have the like force and effect, and have the same operation in Western Australia ; and every executor or administrator thereunder shall have the same power and authority, rights and privileges, and perform the same duties, and be subject to the same liabilities, as if such probate or letters of administration had been originally granted by the Supreme Court of Western Australia.

3. The Seal of the Supreme Court of Western Australia shall not be affixed to any probate or letters of administration granted in any other part of Her Majesty’s Dominions so as to give operation thereto as if the grant had been made by the Supreme Court of Western Australia, until all such probate, stamp and other duties (if any) have been paid as would have been payable if such probate or letters of administration had been originally granted by the Supreme Court of Western Australia ; and further, such letters of administration shall not be so sealed until a bond has been entered into by such executor or administrator, or his attorney or agent, with or without one or more sureties, as the Supreme Court may in each case direct, conditioned for the due administration of the estate of the testator or intestate (as the case may be).

Seal not to be affixed till duty is paid.

and as to administration till bond is entered into.

4. This Act shall come into operation and take effect on such day as may be appointed by the Governor in Council.

Commencement of Act.

5. This Act may be cited as ‘ The Foreign Probate Act.’

Short title.

In the name and on behalf of the Queen I hereby assent to this Act.  
H. ST. GEORGE ORD, Governor.



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*Each division is divided into two parts, the first being the ordinary index, the second the geographical index.*

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and to *Oulton v. Radcliffe*, L. R. 9 C. P. 189.

Page 10.—The following footnote should be appended to the first paragraph :

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